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United States
Circuit Court of Appeals
For the Ninth Circuit. 1105
1

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

CHARLES E. KING,

Appellant,

vs.

WILLIAM O. SMITH, E. FAXON BISHOP,
ALBERT F. JUDD and ALFRED W. CAR-
TER, as Trustees Under the Will and of the
Estate of BERNICE PAUAHI BISHOP,
Deceased,

Appellees.


Transcript of Record.

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

Filed

JUL 3 - 1917

F. D. Monckton,
Clerk.



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

**Petition for Allowance of Resignation of Samuel M.
Damon as Trustee.**

To the Honorable Presiding Judge at Chambers of
the Circuit Court of the First Judicial Circuit,
Territory of Hawaii:

Your petitioners, W. O. Smith, Samuel M. Damon,
E. Faxon Bishop, Albert F. Judd and Alfred W.
Carter, all residing in the City and County of Hono-
lulu, Territory of Hawaii, respectfully represent
and show:

1. That your petitioners are the Trustees under
the Will and of the Estate of Bernice Pauahi Bishop,
late of Honolulu aforesaid, deceased, who died on
the 16th day of October, 1884, and whose Will and
the two codicils thereto were admitted to probate by
the Supreme Court of the Hawaiian Islands on the
2d day of December, 1884, as the last Will and Tes-
tament of said deceased;

2. That said Samuel M. Damon, one of your peti-
tioners, has presented to the remaining of your peti-
tioners his written resignation from the office of
trustee under the said will and of the said estate, a
copy whereof, marked Exhibit "A," is attached
hereto and made a part hereof;

3. That said Samuel M. Damon is, and for some
time last past has been, absent from the Territory of

Hawaii, sojourning in the State of California, and is therefore unable to perform his duties as such Trustee; [1*]

4. That said Samuel M. Damon therefore desires to resign his said office as such Trustee and be relieved and discharged from his responsibility as such Trustee, and by reason of the facts aforesaid the remaining of your petitioners are willing that the resignation aforesaid of said Samuel M. Damon be allowed and that some other suitable person be appointed as a trustee under the said Will and of the said Estate in succession to said Samuel M. Damon;

WHEREFORE your petitioners pray that the resignation of the said Samuel M. Damon be allowed to take effect upon the appointment of his successor as Trustee under the said Will and of the said Estate; and your petitioner, said Samuel M. Damon, prays that he may be discharged of all further responsibility as such Trustee, and that his bond may be ordered to be cancelled, and his sureties thereto released from their obligation thereunder.

Dated June 9th, 1916.

WILLIAM O. SMITH,
SAMUEL M. DAMON,
E. FAXON BISHOP,
ALBERT F. JUDD and
ALFRED W. CARTER,
Said Petitioners.

By (Sgd.) HOLMES & OLSON,
Their Attorneys. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

EXHIBIT "A."

Belmont, Cal., May 19th, 1916.

Trustees Under the Will and of the Estate of Bernice P. Bishop, Deceased, Honolulu.

Dear Sirs:

I hereby resign the office of trustee under the Will and of the Estate of Bernice P. Bishop, deceased, this resignation to take effect upon the appointment of my successor in office.

Yours truly,

S. M. DAMON. [3]

Territory of Hawaii,

City and County of Honolulu,—ss.

Albert F. Judd, being first duly sworn, deposes and says:

That he is one of the petitioners in the foregoing petition; that he has read the said petition and knows the contents thereof and that the same are true to the best of his knowledge, information and belief.

(Sgd.) ALBERT F. JUDD.

Subscribed and sworn to before me this 9th day of June, 1916.

[Seal]

(Sgd.) FLORENCE LEE,

Notary Public, First Judicial Circuit, Territory of Hawaii. [4]

[Endorsement]: In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers. In Equity. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Petition for Allowance of Resignation of Samuel M. Damon as Trustee. Filed 3:25 o'clock P. M. June 9, 1916.

(Sgd.) Huron K. Ashford, Clerk. Eq. No. 2048. Reg. 2, pg. 297. Holmes & Olson, Attys. for Petitioners. [5]

Plaintiff's Exhibit "A"—Resignation of S. M. Damon as Trustee, Dated Belmont, May 19, 1916.

Belmont, Cal., May 19th, 1916.

Trustees Under the Will and of the Estate of Bernice P. Bishop, Deceased, Honolulu.

Dear Sirs:

I hereby resign the office of trustee under the Will and of the Estate of Bernice P. Bishop, deceased, this resignation to take effect upon the appointment of my successor in office.

Yours truly,

(Signed) S. M. DAMON.

[Endorsement]: In the Matter of the Estate of Bernice P. Bishop, Deceased. Resignation of S. M. Damon as Trustee. Eq. No. 2048. Reg. 2., pg. 297. Eq. No. 2048. Plaintiff's Exhibit "A." Filed June 9, 1916. (Signed) Huron K. Ashford, Clerk. [6]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

**Petition for Confirmation of Appointment of a New
Trustee.**

To the Honorable Presiding Judge at Chambers of
the Circuit Court of the First Judicial Circuit
of the Territory of Hawaii:

Your petitioners, William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, all residing in the City and County of Honolulu, Territory of Hawaii, respectfully represent and show:

1. That your petitioners are Trustees under the Will and of the Estate of Bernice Pauahi Bishop, late of Honolulu aforesaid, deceased, who died on the 16th day of October, 1884, and whose Will and the two codicils thereto were admitted to probate by the Supreme Court of the Hawaiian Islands on the 2d day of December, 1884, as the last Will and Testament of said deceased;

2. That Samuel M. Damon of said Honolulu, one of the five trustees under the said Will and of the said Estate, has resigned his office as such Trustee, and by reason thereof a vacancy has occurred.

3. That in and by the said Will it is provided that any such vacancy shall be filled by the choice of a majority of the Justices of the Supreme Court of Hawaii, the selection to be made from persons of the Protestant religion;

4. That on the 9th day of June, 1916, a majority of the [7] Justices of the Supreme Court of the Territory of Hawaii, under and by virtue of the power of appointment conferred upon them by the

said Will as aforesaid, appointed William Williamson of said Honolulu, Trustee under the said Will and of the said Estate in the place of and in succession to the said Samuel M. Damon, resigned as aforesaid;

5. That the said William Williamson is a resident of said Honolulu and is a person of the Protestant religion and is a proper and suitable person to be appointed as such Trustee and to act as such, and is willing to accept such appointment and become such Trustee, and is ready and willing to undertake and perform the duties appertaining to such office;

WHEREFORE, your petitioners pray that the appointment of said William Williamson as a Trustee under the said Will and of the said Estate in the place of and in succession to said Samuel M. Damon, resigned, be approved and confirmed upon his filing a bond in accordance with such order as this Honorable Court shall make.

Dated, June 9th, 1916.

WILLIAM O. SMITH,
E. FAXON BISHOP,
ALBERT F. JUDD and
ALFRED W. CARTER,

Trustees Under the Will and of the Estate of Bernice Pauahi Bishop, Deceased,

By (Signed) HOLMES & OLSON,
Their Attorneys. [8]

Territory of Hawaii,
City and County of Honolulu,—ss.

Albert F. Judd, being first duly sworn, deposes and says:

That he is one of the petitioners in the foregoing petition; that he has read the said petition and knows the contents thereof and that the same are true.

(Signed) ALBERT F. JUDD.

Subscribed and sworn to before me this 9th day of June, 1916.

[Seal]

(Sgd.) J. A. DOMINIS,

(S.) J. A. D. Clerk Circuit Court ~~Notary Public~~, First
Judicial Circuit, Territory of Hawaii.

[Endorsement]: Circuit Court, First Circuit, Territory of Hawaii. At Chambers—In Equity. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Petition for Confirmation of Appointment of a New Trustee. William Williamson. Filed 3:45 o'clock P. M., June 9, 1916. (S.) Huron K. Ashford, Clerk. Eq. No. 2048. Reg. 2, pg. 297. Holmes & Olson, Attorneys for Ptff. [9]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

In the Matter of the Estate of BERNICE
PAUAHI BISHOP, Deceased.

**Decree Accepting Resignation of S. M. Damon as
Trustee.**

The petition of W. O. Smith, Samuel M. Damon, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, filed herein on the 9th day of June, 1916,

whereby the said petitioners pray the allowance of the resignation of said Samuel M. Damon from the office of Trustee under the Will and of the Estate of Bernice Pauahi Bishop, deceased, and the said Samuel M. Damon, one of said petitioners, prays for his discharge from all further responsibility as such Trustee and for the cancellation of his bond and the release of his sureties on said bond from their obligation thereunder, having come on to be heard before the undersigned presiding judge at Chambers of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and evidence having been adduced at said hearing held this 9th day of June, 1916, in support of the allegations of the said petition, and it appearing that the said allegations are true, and good cause appearing why the prayer of the said petitioners for the allowance of the said resignation should be granted, and no good cause why the same should not be granted;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the resignation of the said Samuel M. Damon from the office of Trustee under the Will and of the Estate of the above-named Bernice Pauahi Bishop, deceased, be, and the same is hereby, approved, accepted and allowed, and that said resignation take [10] effect upon the appointment of the successor to said Samuel M. Damon in said office;

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED that the said petitioners forthwith upon the appointment of a successor to said Samuel M. Damon in said office file herein a

true and correct account of the said Estate as such Trustees and that upon the approval thereof and the vesting of the said estate in the said petitioners other than said Samuel M. Damon, together with the successor to said Samuel M. Damon, as Trustees under the said Will and of the said Estate, the said Samuel M. Damon be discharged from all further liability or responsibility as such Trustee, and his bond cancelled and his sureties thereon discharged and released from all liability thereunder.

Dated, June 9th, 1916.

(Circuit Court Seal)

(Signed) C. W. ASHFORD,

First Judge, Circuit Court, First Circuit, Territory of Hawaii, Presiding at Chambers.

Attest: (Signed) HURON K. ASHFORD,

Clerk of Said Court.

[Endorsement]: In the Circuit Court of the First Judicial Circuit Territory of Hawaii. At Chambers—In Equity. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Decree Accepting the Resignation of Samuel M. Damon, as a Trustee. Filed at 8:40 o'clock A. M., June 10th, 1916. (S.) J. A. Dominis, Clerk. Eq. No. 2048. Reg. 2, pg. 297. [11]

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

AT CHAMBERS—IN EQUITY.

EQUITY No. 2048.

In the Matter of the Resignation of SAMUEL M. DAMON as a Trustee Under the Will and of the Estate of BERNICE PAUAHI BISHOP, and the Appointment of a Successor to Said Trustee.

Opinion and Decision.

BEFORE THE FIRST JUDGE.

THE HIGH CHIEFESS, BERNICE PAUAHI BISHOP—"the last of the KAMEHAMEHAS"—died testate, in Honolulu, October 16, 1884, and her Last Will and Testament, including two Codicils, was admitted to Probate December 2nd, 1884, in the Supreme Court of the Hawaiian Islands, which Court, at that date, had jurisdiction of Probate and Equity matters. In and by the Fourteenth paragraph of her said will Mrs. Bishop appointed her husband, CHARLES R. BISHOP, SAMUEL M. DAMON, CHARLES M. HYDE, CHARLES M. COOKE, and WILLIAM O. SMITH, all of Honolulu, "to be her trustees to carry into effect the trusts" specified in the will. Said paragraph contains the further provision which I here quote:

"I further direct that the number of my trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Jus-

tices of the Supreme Court, the selection to be made from persons of the Protestant religion.”

THE PRIMARY OBJECT expressed in the will, mentioned [12] is contained in the Thirteen paragraph thereof, from which I quote as follows:

“I give, devise and bequeath all of the rest, residue, and remainder of my Estates real and personal, wheresoever situated unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools.”

AND, AFTER MAKING COMPREHENSIVE PROVISION of funds for the maintenance and conduct of said Schools, and for devoting “a portion of each year’s income to the support and education of orphans and others in indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood,” said paragraph instructs the trustees “to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women,” making “the higher branches subsidiary to the foregoing objects.” Full power of control over the donor’s Estate to sell, invest and reinvest, etc., is given, together with authority “to make all such rules and regulations as they (the trustees) may deem necessary for the government of said Schools and to regulate the admission of pupils, and the same

to alter, amend and publish upon a vote of a majority of said trustees."

THE TRUSTEES, acting under the will, have established two schools at Kalihi, in this city, one for boys and one for girls. The boys' school has been in operation about twenty-nine years, and has graduated twenty-six annual classes of students. The girls' school was established some years later than that for boys. As a matter of practical administration of the trusts, the trustees have limited to boys and girls of aboriginal Hawaiian blood (either in whole or in part), the privilege of attending said Schools, although there is no such limitation provided for in the will. The only expression of preference for Hawaiians, as objects of the bounty of the donor, is that above quoted, namely, the provision that, in the distribution of a portion of each year's income to the support and education of orphans and others in indigent circumstances, preference shall be given to Hawaiians, of pure or part aboriginal blood. [13]

THE ESTATE NOW CONTROLLED by the trustees under the will approximates Five Million Dollars in value; the Schools are large and apparently well equipped, and the board of trustees, throughout its changing *personnel*, has adopted and maintained a scheme of education upon lines so broad and comprehensive (notwithstanding the above mentioned limitation of the privilege of attendance to Hawaiians), as to invest this trust with all the characteristics of a quasi public trust, and as

such, I shall regard it in the course of this opinion. And this quasi public character of the trust invests it with an interest which impels the Court to a somewhat closer scrutiny of the affairs which it comprehends than might be called for in the case of a purely private trust.

AS ABOVE, five individuals were named to constitute the original board of trustees, but during the nearly third of a century that has since elapsed, many changes in the *personnel* of the board have taken place. The latest of these changes consisted in the resignation of SAMUEL M. DAMON as such trustee, which resignation was, by his co-trustees, presented to this Court for acceptance, on the 9th of June last, and a decree approving and accepting said resignation, and providing for the presentation of the accounts of the trustees as the same shall stand immediately upon the qualifying of a successor to said SAMUEL M. DAMON, was immediately signed and fixed in this cause. Immediately thereafter, the four remaining trustees, namely: WILLIAM O. SMITH, E. FAXON BISHOP, ALBERT F. JUDD and ALFRED W. CARTER, presented to the Court their "*Petition for confirmation of appointment of a new Trustee.*" This petition sets forth that a vacancy in said board of trustees exists by reason of the resignation of said SAMUEL M. DAMON; that said will provides that such vacancy shall be filled by the choice of a majority of the Justices of the Supreme Court of Hawaii, the selection to be made from persons of the Protestant religion; that on said 9th day of June, a majority (to wit: all)

of the Justices of said Supreme Court, "under and by virtue of the power of appointment conferred upon them by said will as aforesaid, appointed WILLIAM WILLIAMSON, of said Honolulu, trustee under said will, and of the Estate, in place of and in succession to the said SAMUEL M. DAMON, resigned as aforesaid; that said WILLIAM WILLIAMSON is a resident of Honolulu, and is a person of the Protestant religion, and is a fit and proper and suitable person to be appointed as such trustee and to act as such, and is willing to accept said appointment and to become such trustee," etc. And it prays "that the appointment of said WILLIAM [14] WILLIAMSON as a trustee under the said will and of the Estate in the place of and in succession to said SAMUEL M. DAMON, resigned, be approved and confirmed upon his filing a bond in accordance with such order as this Honorable Court shall make."

IN SUPPORT OF THE ALLEGATIONS of said last named petition, said remaining trustees introduced in evidence certified copies of three documents, as follows:

(1) A request, under date of said June 9th, by said remaining four trustees, addressed to the Justices of said Supreme Court, by name, wherein it is represented that the signatory parties to said request are trustees under said will; that said SAMUEL M. DAMON, formerly such trustee, has resigned, and that by reason thereof there is now a vacancy in said office; that in and by the said will it is provided that the number of trustees thereunder and of said Estate

shall be kept at five, and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion. And the signatory parties request said Justices to appoint some person as such trustee, in place of and in succession to, said SAMUEL M. DAMON, "and suggest that WILLIAM WILLIAMSON, of said Honolulu, who is a person of the Protestant religion, is a suitable and proper person to be appointed such trustee, and respectfully recommend his appointment as such";

(2) An affidavit by said WILLIAM WILLIAMSON to the effect "that he is a person of the Protestant religion";

(3) A paper entitled "Appointment of Trustee," signed by the Chief Justice and the Associate Justices of said Supreme Court, reciting the resignation of said DAMON and the vacancy existing in said board of trustees by reason thereof, the provision of said will as to the manner in which such vacancies shall be filled (as hereinabove repeatedly quoted), and a purported appointment of said WILLIAM WILLIAMSON as such trustee, in the following language:

"Now, Therefore, Know All Men By These Presents: That the undersigned Justices of the Supreme Court of the Territory of Hawaii, being a majority of the Justices of said Supreme Court, by virtue and in exercise of the power for this purpose given to them in and by said will, do hereby appoint WILLIAM WILLIAMSON of the [15] City and County of Hono-

lulu, Territory of Hawaii (a person of the Protestant religion), a trustee under the said will and of the said Estate in place of, and in succession to the said SAMUEL M. DAMON, resigned."

ORAL EVIDENCE was also introduced touching the personal, moral and business qualifications of said WILLIAM WILLIAMSON for appointment to a place upon said board. As to this feature, the Court desires to express entire satisfaction with the qualifications of MR. WILLIAMSON for such appointment, in all respects save one, namely; that it has not been made to appear that he is so qualified, by length of residence in Hawaii, or by familiarity and sympathy with the history, manners, customs, language, ideals and aspirations of the Hawaiian people as to mark him out as a fit and suitable person to be appointed to an office where he would be authorized and expected to exercise a wide, benevolent and sympathetic discretion with reference to the education of Hawaiian youth, of either sex, and concerning the general scheme, system and regulations to be adopted and observed during their attendance at the Schools in question. The Court reserved its ruling upon the petition, because of doubts which it entertained concerning the authority of the Justices of the Supreme Court to make such an appointment, and the validity of the appointment as so purporting to have been made, and arranged for argument upon those points. The Court further requested Mr. D. L. WITHINGTON, and Ex-Judges PERRY and HUMPHREYS,

members of this bar, to favor it with their views, as *Amici Curiae*, upon the questions involved. The Alumni Association of Kamehameha Schools retained E. C. PETERS, Esq., to present the views of that Association, and upon the day appointed for further hearing, elaborate arguments were submitted on the part of the trustees, by the *Amici Curiae*, and by Mr. Peters; and the Court desires here to express its sense of obligation to the gentlemen who so willingly and at the sacrifice of much time and effort made research into the questions involved, and favored the Court with the results of such research, as *Amici Curiae*. The fact that the Court has reached conclusions quite different from those reached by the gentlemen last referred to, should in nowise detract from the credit due to them for their exhaustive labors and illuminating arguments in the premises.

IT IS TO BE OBSERVED that the petition now under consideration is one praying for the "confirmation" by this Court of the "appointment" of Mr. WILLIAMSON, as such trustee [16] alleged to have been made by the Justices of the Supreme Court. And this brings us to a consideration of the question whether the Justices of the Supreme Court had any right, authority, or jurisdiction to so appoint a trustee, or, in the language of the will, to make and certify a "choice" of a person to be so appointed, to fill the existing vacancy. In this connection, a review of the history of the appointments heretofore made to fill such vacancies is both interesting and instructive. And this review,

of necessity, includes a consideration of the state of our statute law at the date of the execution by Mrs. Bishop of her Will and the Codicils thereto; at the date of the admission of the Will to Probate; at the date of the filling of the first vacancy, and at the present date. Advertising first to this feature of the case, we find that at all times including the dates of the execution of the Will and Codicils, and thence to the taking effect of the Judiciary Act of 1892, which went into operation January 1st, 1893, the Supreme Court, and the several justices thereof, had jurisdiction of all matters in equity. *Session Laws* 1878, Chap. XV, Sec. 2, *Compiled Laws*, 1884, p. 389. At the argument herein, it was suggested, on behalf of the trustees, that not the Supreme Court, but only the individual Justices thereof had equity jurisdiction, prior to the taking effect of the Judiciary Act above mentioned. But this feature has been expressly decided to the contrary in *Asing v. Aiona*, 6 Hawn. 281. Upon the state of law thus suggested, is based the claim of the trustees that the donation to the Justices of the Supreme Court of the power of appointment, was not a donation to the Court as such, acting judicially, but, on the contrary, that it was a donation to the individuals who, at the date of any specific request for such appointment, should chance to hold those offices. I defer to a later portion of this opinion, a more minute examination of this phase of the question.

WITH RESPECT TO THE POWER OF APPOINTMENT, in such a case, we may start

with the familiar proposition that it is competent for the donor of a power, whether created by will or by deed, to name a trustee or trustees to execute the trust, or, to leave their selection to others, whether private individuals, public officials, or courts of competent jurisdiction—and, in like manner, to provide for the filling of any vacancies that may arise in the trusteeship. This principle is thus succinctly expressed in 28 *Am. & Eng. Ency. of Law*, 2 Ed. p. 964:

“It is the right of the creator of a trust to provide a method for filling vacancies occurring in the [17] office of trustee, subject to the statutory requirements to be found in most jurisdictions, that the trustee so appointed must be accepted by the court.”

THERE IS NO SUCH statutory requirement in this territory, that a trustee so appointed be accepted by the court; but it is familiar law, so familiar that the citation of decisions in support thereof may be dispensed with, that where no provision has been made for the filling of such vacancies or where the provision attempted to be made is an illegal and void one, or where such provision, although valid when made, has become incapable of execution by reason of changes in the statute law—then, such appointment shall pertain and belong to the court exercising equity jurisdiction. Consequently, in the case at bar, if it be found either that the method provided in the Will for the appointment of trustees to fill vacancies was illegal, or incapable of execution according to law as the law stood when the

first such attempt was made, or, of legal and valid, at an earlier period, that it has become illegal, invalid and incapable of execution at a later date, then the authority to fill the now subsisting vacancy devolves upon the judge or judges of the First Circuit Court, exercising equitable jurisdiction, at chambers. First let us consider whether the power was valid, and could have been exercised according to the law prevailing in Hawaii at the date of the Will, and at the date of its probate, and, possibly, at any subsequent date upon which such appointment was sought. For the purposes of this feature of the discussion, I will assume a point which, later in this opinion, I will endeavor to fortify by the citation of authorities, namely, that the power to fill vacancies in the board of trustees under Mrs. Bishop's will was conferred, not upon the individuals who might chance, for the time being, to hold the offices of Justices of the Supreme Court, but that it was, by virtue of the language employed in the will, conferred upon said Supreme Court as a judicial tribunal. Upon this assumption the power was valid, and might have been executed by the Supreme Court in strict conformity with the statute law of Hawaii as it then existed, namely, by virtue of Chapter XV, of the Session Laws of 1878, which remained (at least substantially) without amendment until the Judiciary Act of 1892 went into operation, January 1st, 1893. By that statute (Chapt. XV, 1878) not only the several Justices of the Supreme Court but the Supreme Court itself, were given jurisdiction to hear and determine all

matters in equity (*Asing v. Aiona*, 6 Haw. 281, *supra*). This point is placed almost, if not entirely, beyond question by one feature in the history of this Estate. It is this: W. O. SMITH, one of the trustees named in the will [18] having removed to California, tendered his resignation as such trustee to "the Honorable Justices of the Supreme Court of the Hawaiian Islands." The resignation was accepted, thereby creating the first vacancy in the board. Thereupon the Supreme Court, as a judicial tribunal, proceeded to appoint a successor to MR. SMITH. I quote liberally from the records of the Court in that matter, as follows:

The proceeding (including the resignation of Mr. Smith) is entitled: "In the Supreme Court of the Hawaiian Islands in re Estate of Bernice Pauahi Bishop, deceased, in Probate, before Judd, C. J., and McCully, J., Thursday, October 21, 1886. Hearing on appointment of a new trustee. (Present, Charles R. Bishop, one of the trustees.)

"Mr. Bishop files the resignation of William O. Smith as a trustee and nominates Joseph O. Carter, of Honolulu, to fill the vacancy. The Court refers to the will of the deceased and in accordance with Article 14 of said will and knowing that said nominee is a person of the Protestant religion, appointed said Joseph O. Carter as a trustee to fill the vacancy. The Court orders the present trustees to execute and file a new bond in the sum of Twenty-five Thousand Dollars (\$25,000) on the filing of which the old

bond to be cancelled. New bond filed and old one cancelled.

(Signed) "HENRY SMITH,
Deputy Clerk."

THERE APPEARS some inconsistency between the foregoing, and a certain written Order filed on the same date, and which is entitled:

"In the Supreme Court of the Hawaiian Islands; in the matter of the Estate of Bernice Pauahi Bishop; before the Justices of the Superior Court. Order discharging trustee cancelling trustees' bond and appointing new trustee." The Order recites, inter alia, that William O. Smith was appointed one of the trustees under said will, and whereas he has resigned from said trusteeship, and his resignation has been accepted; "Now therefore we, the Justices of the Supreme Court, in pursuance of the power and authority vested in us by Article 14 of the said will hereby accept the resignation of the said William O. Smith, trustee aforesaid, and discharge him from further responsibility in regard to said trust, and appoint as trustee in place of said William O. Smith, Joseph O. Carter of Honolulu, Oahu," The Order is signed by the then Chief Justice, A. F. Judd, and by the then Associate Justices, L. McCully and Edward Preston. [19]

IT IS ALSO WORTHY OF NOTE that the purported appointment by the Justices of WILLIAM WILLIAMSON, besides being signed by the Justices, is impressed with the seal of the Supreme Court, and is filed in the archives of said Court as a

Court document. The same is true of every appointment purporting to have been made by the Justices of the Supreme Court under said will, except that, in one or two instances, the document of appointment is not impressed with the Court's seal.

AS ABOVE, the first vacancy in the board was created by the resignation of Mr. Smith, in 1886, at a date when the Supreme Court and its several justices were exercising both probate and equity jurisdiction. It is a somewhat peculiar fact that in all, or nearly all of the applications for appointments of new trustees under this will, the documents are entitled as "In Probate," instead of "In Equity." Under our system, the court, sitting in probate, has no jurisdiction to appoint trustees, although, doubtless, it may distribute an estate to trustees named in a will. In this respect our system differs from the statutory systems in vogue in several of the New England States, and, perhaps, in other jurisdictions, where statutory authority is conferred upon courts sitting in probate, to appoint trustees, especially in respect of testamentary trusts.

THE GENERAL SYSTEM pursued in the filling of vacancies in the trust now under discussion, since the enactment of the Judiciary Act which became operative January 1, 1893, appears to have been as follows, although with some variations, viz.: the facts constituting the vacancy have been brought to the attention of the Justices of the Supreme Court, with a request that they would make an appointment to fill the vacancy, and such request has invariably been accompanied by a recommendation of

the trustees making it, for the appointment of a specific person; and the Justices have invariably adopted such recommendation and have assumed and purported to appoint the person and persons so recommended. Thereupon (as in the case at bar), the trustees have presented to the Judge of this Court, sitting in Equity, a petition for the "confirmation" of such appointee of the Justices of the Supreme Court, and up to this date, such confirmation has been granted, virtually as a matter of course. This procedure is not a little puzzling to the court, as, if the Supreme Court Justices, as claimed, have the right to "choose" (which they have never, in a literal sense, assumed to do), or to "appoint" a new trustee (as they have invariably assumed to do), then the question arises as to what legal occasion there can possibly exist for a "confirmation" [20] by this Court. Counsel for the trustees, upon argument herein, when questioned as to this feature, was understood to admit that, probably, there is no occasion for such "confirmation"—but he justified the course here taken upon the ground of precedent and, if precedent can justify a specific procedure, the procedure in the present instance is doubtless fully justified. There is, however, authority for the proposition that although some one other than this Court has a right to nominate a trustee, yet the acceptance or confirmation of such nomination rests with this Court. Thus, in *Estate of Schott*, 11 Philadelphia Reports, the Orphans' Court of Philadelphia (a Court of high national reputation), held as follows:

“Although the legatee has the right to nominate her husband as trustee of her estate, yet it is within the discretion of the court to ratify the choice, and make the appointment. In some cases we have refused, as we believe it contrary to the policy of the law, to appoint a husband trustee of the estate of his wife, or a parent guardian of the estate of his child.”

THE EMPLOYMENT of the words “choice” and “appointment” in the foregoing quotation are significant in their relation to the case at bar, for the will of Mrs. Bishop, if it confers any authority upon the Justices of the Supreme Court which has survived to them, confers merely the authority of “choice,” or to choose, select and nominate a trustee, to the Court having the jurisdiction to make the “appointment”—which Court, as I conceive, is now, by virtue of our altered judicial system, the Circuit Court or a judge thereof, sitting in equity. It follows, then, from this postulate (even if it be a correct one, which I do not concede), that the maximum authority now resting with the Justices of the Supreme Court is the authority of “choose” and nominate to this Court, in Equity, a candidate to fill such vacancy, leaving it to this Court to accept or reject such nomination, in its discretion, and to appoint or to refuse to appoint such nominee. But, as above, it is my judgment that even this comparatively attenuated authority has been withdrawn from the Justices of the Supreme Court, or, rather, from the Court itself, by virtue of the transfer of equitable jurisdiction from the Supreme Court and its Jus-

tices, to the Judges of the Circuit Court, sitting at Chambers.

THIS VIEW finds support in a case decided in the chancery division, of the British Supreme Court of Judicature, in 1883, [21] *In Re Gadd (Eastwood v. Clark)*. In that case a testator by his will, appointed his wife and another, executors and trustees of his estate, and provided "that on the death, refusal, or incapacity to act of any trustee or trustees, the surviving or acting trustee, his executor or administrator might appoint a new trustee or new trustees as occasion might require," etc. The wife died leaving the other trustee surviving. A beneficiary under the will, in an action for the administration of the estate, obtained judgment to the effect that "some proper person be appointed a trustee of the testator's will in the place of the said Mary Gadd, and jointly with the defendant, the existing trustee." Thereafter, the beneficiary mentioned, nominated Eastwood, and the surviving trustee nominated Whitely. The court made an order appointing Eastwood as joint trustee with the defendant. The defendant appealed, and the court, consisting of three Lords' Justices, including the Master of the Rolls, decided that the appointment could not stand, adding: "If the plaintiff wishes to take objections to the fitness of the defendant's nominee the case will be referred back to the Vice Chancellor to consider the objections. If they are allowed, then the defendant must nominate some other person, subject to the approval of the court." It will be observed that nowhere in the will there under consideration

was there any suggestion that any court should have a power either to appoint, confirm or reject any nomination that might be made by a surviving trustee. And yet, under general principles of equity, the court decided that chancery holds that supervisory power over all such nominations and appointments. The language of the will in that instance was much more positive than here, and yet as we have seen the court construed it to be subject to the authority of the court to pass upon the nomination, and approve or reject it.

ASSUMING, for the purposes of this argument, but not conceding or deciding, that the Justices of the Supreme Court may still exercise the right of choice and of nomination of a new trustee to the Circuit Judge sitting in Equity, and treating the purported "appointment" of Mr. WILLIAMSON as such a choice and nomination, this Court respectfully declines to confirm, or to appoint Mr. WILLIAMSON to the position to which he has been thus ostensibly chosen and nominated. As above expressed, there are no objections to the moral, intellectual or business qualifications of Mr. WILLIAMSON, but this Court feels that, in the administration of a quasi public trust of this magnitude, which has undertaken and is conducting a comprehensive scheme and system of education of the Hawaiian youth, of both sexes, and resident in all parts of the Territory, [22] it is at least reasonable, even if not logically imperative, that the Hawaiian race should be represented in the administration of such trust, and granted the privilege of there expressing, advocat-

ing and promoting the ideals, ambitions and aspirations of the Hawaiians as a people, with respect to the manner in which the youth of that race shall be educated, and the conditions under which their attendance at school shall be conducted. As above remarked, there is no evidence of record to show that Mr. WILLIAMSON possesses any of the peculiar qualifications herein recited. It has been urged upon argument that Mrs. Bishop, the donor of this trust, herself an "Hawaiian of the Hawaiians," made no choice of an aboriginal Hawaiian to serve upon the board of trustees, but selected only those of foreign blood or birth. It may be that this argument should have been accorded decisive weight in the years that are gone, at least during the first, or possibly, during the second decade of the existence of the trust. But it must be remembered that the Boys' School in question has been in practical operation some twenty-nine years; that it has graduated no less than twenty-six classes, containing many hundreds of Hawaiian boys; that the first of those classes has now been graduated twenty-five years, and that its members, as well as scores of members of succeeding classes have, since this trust was established, and following their graduation, had many years of intercourse, not only with the members of their own race but with the community in general, in which, as we are proud to claim, Anglo-Saxon ideals of life and government have been and are being most satisfactorily promoted and observed. It would therefore, in my opinion, be a gross slander upon the Hawaiian race, and especially upon the

hundreds of male Alumni of Kamehameha School, to assert that no member of that race is now fitted to discharge the duties which devolve upon a trustee under the will of Mrs. Bishop. If, as has not been shown, and I am unwilling to believe, that School, so conducted by a board of Anglo-Saxon trustees during a period of twenty-nine years, has not succeeded in producing one man who is mentally and morally fitted for the discharge of the duties of such trusteeship, then, in my opinion, it is high time to inaugurate such a revolution in the *personnel* of the board as will insure the adoption of such a course of education at the School in question as will more nearly conform to the objects of its most generous founder.

BUT, IT IS INSISTED, on behalf of the trustees, that the language quoted from the Fourteenth paragraph of the will confers the power of "choice" or "appointment" of new trustees upon the Justices of the Supreme Court *as individuals*, [23] and not upon the court as a judicial tribunal, or upon its members acting in a judicial capacity. The reverse of this proposition has been assumed in a former portion of this opinion, but this claim may be here examined in detail, to the end that we may be convinced of its validity, or otherwise. At this point I desire to state that I have read and pondered, and, with respect to many of the decisions, have re-read, every line of legal literature cited to me at the argument, in addition to which I have pursued a research on my own behalf which I believe to be virtually exhaustive of the subject, at least within the limits of our library facilities, which are by no means slender.

As a result of this research and study, I am persuaded that the position assumed by the counsel for the trustees, as well as by the *Amici Curiae* above referred to, is not sustained in reason or principle, although, it must be admitted there are court decisions which, considered *solis*, might support their position. The argument appears to narrow itself down to the question whether a power of appointment conferred upon a judicial officer, or rather, upon the incumbent of a judicial office, without naming him, shall be taken as an intention to confer the power upon the individual who, at the specific period when such appointment is to be exercised, holds the judicial office in question, or whether it shall be construed as an intention to confer such power upon the court of which such judicial officer is a member, or over which he presides? Otherwise expressed, it is a question whether a power of appointment conferred upon "a majority of the Justices of the Supreme Court" shall be construed as authorizing the persons who, at the date of any request for the appointment of a trustee, chance to fill those offices, and acting in their individual, as distinguished from their judicial capacities, to "choose" or "appoint" a new trustee—or whether the power of choice or of appointment (in whichever of these two ways the language of the will may be construed), was conferred upon the Supreme Court, as a whole, and acting judicially.

IN THE FIRST PLACE, let it be noted that there was, at the date when the will was executed, as also when it was probated, no legal obstacle to mak-

ing the Supreme Court of Hawaii the donee of the power of appointment, in the event of vacancies arising in the board of trustees. Whether such appointment, in the absence of statute providing a different course falls under the probate or under the equity jurisdiction (I incline to the view that the latter is the appropriate division), it is clear that the Supreme Court, as well as its individual Justices were then invested with the necessary jurisdiction to act. I find no obstacle to this conclusion in the phrase employed [24] in the will—"a majority of the Justices," etc., because courts of necessity act by majorities where they are composed of several judges. It was therefore a most natural and logical donation of the power of appointment to a judicial body having full and ample jurisdiction in the premises, but evincing a desire that such appointments should be the result of the concurrence of more than one mind. At the date of the will, as the writer of this opinion is aware from personal residence, observation and legal practice at this bar, there was virtually no local sentiment, belief, prospect or expectation that the judicial system that then prevailed in Hawaii would be disturbed or altered so as to withdraw from the Supreme Court and its Justices the probate and equity jurisdictions which they then exercised. In fact, our Supreme Court, in those times, much more than in times nearer the present, was considered in its relation to the general scheme of government in Hawaii, very much as the "Rock of Gibraltar" has long been considered in its relation to the fortresses of the world. The court was, in fact,

often likened unto the Rock of Gibraltar with reference to its stability and endurance, both past and prospective. There is therefore no doubt in my mind that it was the intent and purpose of the testatrix to confer upon the Supreme Court, as a judicial tribunal, the power of appointment in the premises. In this respect she avoided an error which frequently crops out in legal literature, viz.: that of attempting to confer a jurisdiction upon a tribunal which was not by law authorized to exercise such jurisdiction. For it is a cardinal rule of jurisdiction that:

“It is not in the power of a testator to confer upon a judicial tribunal a jurisdiction which is not conferred by law.”

Shaw v. Paine, 12 Allen, 293, 296.

In Re Estate of Bernice Pauahi Bishop, 11 Haw. 33.

THE VIEW that the Supreme Court, as a judicial tribunal, was intended to be, and was in fact and in law the donee of the power of appointment herein, finds strong support in the procedure taken upon the occurring of the first vacancy in said board, hereinabove discussed. It was manifestly the view of the only lawyer (Mr. Smith), appointed in and by the will as such trustee, that the jurisdiction to accept his resignation and appoint his successor lay in the Supreme Court, acting judicially, and the record of the proceedings had in that court, upon the presentation of said resignation and the appointment of Mr. Smith's successor, is strongly confirmatory of the [25] position here assumed by me, and that procedure, from first to last, is significant and persua-

sive as furnishing an example of that "contemporary construction" of the will, by parties concerned, which, in cases of doubt, not only with respect to wills but also with respect to contracts and statutes, has ever been strongly relied upon by courts when called upon to construe the documents involved.

"When the language of an act is doubtful in its meaning, and cannot be made plain by the help of any other part of the same statute, or of any act in *pari materia* which may be read with it, or in the course of the common law up to the time of its passing, the court may consider what was the construction put upon the act when it first came into operation."

Per Magie, Justice, *State v. Kelsey*, 44 N. J. Law 1, 47.

"Where the language of a contract is of doubtful construction, the interpretation by the parties themselves is entitled to great weight."

Steinbach v. Stewart, 11 Wall. 566; 20 Law Ed. 56.

"The practical interpretation of an agreement by a party to it is always a consideration of great weight; and there is no surer way to find out what parties meant than to see what they have done.

Brooklyn Life Ins. Co. v. Dutcher, 95 U. S. 269; 24 Law Ed. 410.

THERE IS NO SUBSTANTIAL difference in the rules of construction to be applied to a will, from those applicable to a contract. In either, the intention of the testator on the one hand, or of the con-

tracting parties on the other, is to be regarded as the "Pole Star" by which the mind of the court is to be guided to a conclusion.

BUT, IT IS INSISTED that the authorities support the contention advanced by the trustees, viz.: that the donation to a majority of the Justices of the Supreme Court was a donation of a power to be individually, and not officially or judicially exercised. They rely for support, in that contention, chiefly upon the case of *Shaw v. Paine*, 12 Allen, 293, 296, above cited. That was a bill in equity for specific performance of a contract, [26] and it involved the question as to whether the plaintiff was sole trustee under a certain will, or whether two other parties were joint trustees with him. It was a testamentary trust, with a provision that whenever any vacancy should occur in the number of the trustees, the surviving or acting trustees for the time being should nominate suitable person or persons *to be appointed by the judge of probate for the time being*, in the place of trustees declining, retiring or dying; and there was a limitation whereby the sons of the testator if living and willing to accept the trust, should first be nominated and appointed, and after them, others specified in the will. "And in default of such nomination and appointment I direct that a new trustee or trustees shall in every such case be appointed by the said judge of probate or by one or more of the Justices of the Supreme Judicial Court of this Commonwealth," etc. In Massachusetts, at the date of that decision (1866), there was a probate court presided over by a Judge of Probate, in addi-

tion to which the Supreme Court, and each of its Justices (as in the case of Hawaii when this will was drawn), exercised both probate and equity jurisdiction. Two of the original three trustees resigned their office, the sons and sons-in-law of the testator declined to accept the trust, and the plaintiff, as sole acting trustee, together with said sons and sons-in-law of the testator, presented to the judge of probate a petition setting forth the facts, and praying that the vacancies might be filled by the appointment of parties named by them as trustees to hold the property jointly with the plaintiff. And the judge of probate at a probate court appointed them accordingly. At that date two minor children were interested in the trust fund, who had no notice of the proceedings either in person or by guardian, prior to the appointment. And the point for decision was, whether the plaintiff, the surviving original trustee, could convey legal title to the property of the estate. This involved the question as to whether the lack of notice to the minors mentioned invalidated the proceedings of the court of probate, regarded as a court, wherein it appointed two additional trustees. It was *held* that the action of the probate court, regarded as a court, in making such appointment, was void, *not* for lack of jurisdiction in the court, as such, to appoint trustees, but because of the failure to give notice to the minors referred to, or their guardians. There is, nowhere in the opinion a suggestion that the probate court, as such, was not intended by the will as the donee of the power of appointment,—but the holding is that its

action was invalid for want of notice to interested parties. The court, nevertheless, sustained the appointment [27] as a good and valid appointment *by the judge of probate*. The following language, relied upon the trustees herein, and quoted from p. 296 of the report, does not, in my judgment, deal with any fact arising in that case, for which reason it is to be considered as *obiter dicta*, and not authoritative. I quote:

“If therefore a testator gives by his will to a judicial officer a power of appointment which the law does not give or sanction, their reference to the official character must be regarded as only a description of the person who is to execute the power.”

EVEN if said quoted language be regarded as a part of the judgment in the case, it strikes me as being so illogical and generally unsatisfactory as to render it of no value as a precedent. It is tantamount to saying that, if A confers a power of appointment upon a judicial officer, without naming him, the first question to be decided is, whether the court over which that officer presides is invested by law with jurisdiction to make the appointment. If so invested, then it is a donation to the court as such; but if not so invested, then it is a donation to the individual. I must respectfully decline to follow such logic as this.

THE ONE OTHER Massachusetts case claimed to be an authority in the same direction, is *Nat. Webster Bk. v. Eldridge*, 115 Mass. 424, which was also a case in equity for a specific performance of an

agreement to purchase real estate. The will involved, provided for the filling of vacancies in the trusteeship as follows: in case of death, refusal to act, relinquishment of or removal from the trust, the surviving trustee or trustees should by sealed writing appoint trustees to fill such vacancy, "to be approved by said judge of probate, or by any justice of the Supreme Judicial Court of said Commonwealth;" and in default of such appointment, new trustees should be appointed "by the said judge of probate or by one or more of the said justices." The decision appears to place it, at least in part, upon a technical application of the rules of equity pleading, as follows: the bill having alleged "that the present trustees have received their appointments and have succeeded to the places of the original trustees in manner and form as provided by said will," the bill was demurred to, and the court, at p. 427, quotes said allegations from the bill and remarks that "by the demurrer the facts are admitted to be as set forth in the bill." The procedure actually followed was that the surviving trustees, after the death of one, appointed one Dorr to fill the vacancy, and that appointment was approved by the judge of [28] probate. Thereafter, two of the three resigned, and the sole remaining trustee appointed, and the judge of probate approved of Lawrence and another, Dorr, in their stead. Still later another vacancy having occurred through death, one Bryant was approved by the judge of probate, upon the nomination of the remaining trustees, all without notice to heirs or beneficiaries. The board of trustees as thus finally consti-

tuted (Lawrence, Dorr and Bryant), sold certain of the realty pertaining to the estate at public auction; plaintiff became a purchaser and received conveyance thereof from the trustees and had ever since continued seized and possessed thereof. Thereafter, plaintiff having contracted to sell, and the defendant to buy said property, defendant refused to execute the contract upon the ground that plaintiff could not convey good title thereto. And the defendant's demurrer was based upon the alternative grounds that (1) if the appointment of trustees under the will, or the approval thereof, was vested in the probate court, and the judge of probate in his official capacity, all of said appointments were void, for want of notice and for want of bond; (2) if said appointments and approval were vested in the individual holding the office of judge of probate, and not in the court, as such then, upon each and every such appointment and approval made under said will, there should have been conveyances from the respective trustees to their successors in the trust, which had not been done. The decision is based upon several grounds, the final one being that the trustee Dorr, having been one of the original trustees appointed by the will, and having, after commencement of the suit, conveyed all of his right and interest in the legal title to the new trustees, and the original deed to the plaintiff having been confirmed by a new deed from all of the trustees subsequent to the conveyance by the original trustee to his co-trustees, that series of conveyances "removes whatever doubt there could have been before as to the sufficiency of the plaintiff's title."

And apparently more upon the strength of this last state of facts than of anything else in the case, the demurrer was overruled. But, in the opinion, the court, citing *Shaw v. Paine, supra*, (which, as above, I disapprove and decline to follow), holds that the procedure in the probate court "was not a judicial proceeding, and therefore required no notice." And the opinion further holds that "upon such an appointment the judge of probate acts under the authority conferred upon him by the terms of the will, and not by virtue of his general authority as a court or judicial officer under the statutes establishing the court and defining its jurisdiction." If we accord to these two Massachusetts decisions the utmost effect that can be claimed for them, I still respectfully indulge the privilege of believing that they are illogical in argument and conclusion, and unsound in principle. These cases have been cited in other jurisdictions in numerous cases, since their rendition, but in none that I have seen has their citation [29] been appropriate or necessary to the decision actually made, nor have they been followed in actual decision elsewhere, so far as I have been able to find. This leaves me to comment upon the fact, well known to all lawyers, that any given opinion is an authority only to the extent to which the actual decision goes. There is such a bewildering mass of *obiter dicta* permeating the general volume of American court decisions, that many courts and commentators of whom better things should be expected, have frequently been, as they will be in the future, mislead into adopting such *dicta* as express-

ing the law decided in the cases respectively. I have endeavored to analyze the decisions cited to me, and which I have otherwise found, in my study of this case, in order to separate the pertinent from the impertinent matter with respect to the questions involved.

THE CONNECTICUT DOCTRINE is found in *Wilcox's Appeal*, 54 Conn. 320. A testator having made in a will certain other provisions, gave the residue of his property in trust for his daughter, with the provision that at her death it should be divided into sixteen equal shares and given to persons named. Trustees were appointed, and the provision for the filling of vacancy was that "a trustee to fill such vacancy shall be nominated to the *judge of probate* by at least one-third of the devisees above named," etc. A trustee's place became vacant. Ten of the seventeen persons to whom the sixteen shares of the trust fund were given nominated to the judge of probate as a suitable person to fill the vacancy, one Wilcox. Five of the persons interested in said sixteen shares, uniting with the widow and daughter, nominated one Steadman. "The probate court appointed Mr. Steadman and refused to appoint Mr. Wilcox. An appeal was taken from the decree appointing Mr. Steadman and also from the order refusing to appoint Mr. Wilcox. The superior court reversed the decree appointing Mr. Steadman, but took no action on the decree refusing to appoint Mr. Wilcox. Both parties appealed to this (Supreme) Court" (p. 322). It would appear from the record that no one connected

with the case for a moment dreamed of asserting an individual right in the judge of probate to approve and appoint such nominees, or of suggesting any lack of jurisdiction in the court of probate, acting judicially to so pass upon such nominations and make such appointment. Consequently, the particular and decisive point here involved was not there argued or expressly passed upon, but the supreme court stated one of the two points involved to be as follows: "Has the *court of probate* a discretion to refuse to appoint a suitable person duly nominated according to the terms of the will?" And this question is discussed on pp. 325-6 of the report, wherein the court recites that the statute of Connecticut provides that if no provision is made for the appointment of testamentary trustees, or filling vacancies in a number appointed by testament, [30] the court of probate may appoint. And it decides that "the *court of probate* would doubtless have power to reject the nominee for any cause impeaching his integrity or capacity." I call especial attention to the following language from the opinion (p. 325), as bearing upon the question here involved, viz., whether the donation of a power of appointment to the justices of the Supreme Court is to be regarded as the donation of such power to the court itself, acting judicially? I quote:

"It may be fairly inferred from the fact that the action of the court of probate is invoked, that the testator intended that the nomination should be rejected for good cause shown. It is

not a case for the exercise of discretion, but a case calling for the exercise of legal judgment.”

ANOTHER Connecticut case, strongly favorable to the position here assumed, is Allen’s Appeal, 69 Conn. 702, 707. There was a testamentary trust conferred upon five trustees, with a provision that if the number should be reduced to two, “the judge of probate” in the testator’s district, should appoint a third, and in so doing should regard the wishes of the existing trustees or the persons interested in the estate, so far as he believes he can with safety to the estate, but no further. Three trustees having died, the two survivors expressed no wish as to who should fill the vacancy, and the beneficiaries could not agree upon a nomination, whereupon a beneficiary under the will filed in the court of probate a request for the appointment of a third trustee, nominating her son, but the court appointed a third party, who was unconnected with the testator’s family or relations, and whose appointment had not been requested by any of them. And the supreme court expressly held, upon appeal (p. 707), that “it is obvious that by the term ‘judge of probate’ the testator meant to describe the court of probate for the district of Windsor. * * * It was, therefore, the court of probate which the testator must be deemed to have had in mind, in directing as to the exercise of the power of appointment, although his reference to the ‘judge of probate’ of this district, had it stood alone, might have been taken to apply to that individual who, for the time being, should be occupying that office.” The latter

part of the quotation alludes to a second reference in the will to the "judge of probate," in connection with the fixing of bonds, etc. The Connecticut court makes a misquotation in support of its conclusion, viz., *Bishop v. Bishop*, 54 Conn. 232. The error consists in this, that the reference is obviously to Wilcox's Appeal, above cited, as to which the paging is correct; while the case of *Bishop v. Bishop* proceeds upon entirely foreign [31] matter. It may be convenient at this point, to bring the present case within the effect of the language used by the Connecticut court in the above opinion, and which is represented by the foregoing *asterisks*. It is this (69 Conn. 707):

"The rule of construction that words occurring more than once in a will shall be presumed to be used always in the same sense, unless a contrary intention appears by the context, or they be applied to a different subject, applies with double force where the word in question is found in two sentences in immediate succession."

WE HAVE SOMETHING in the will of Mrs. Bishop that very nearly fits the description of this quotation. The donation of the power of appointment of trustees, is, as above, contained in the fourteenth paragraph of the will. In the thirteenth paragraph we find the following language:

"I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures and of the condition

of said Schools to the Chief Justice of the Supreme Court, or other highest judicial officer in this country."

IN WHAT SENSE did the testatrix use the phrase "Chief Justice of the Supreme Court, or other highest officer in this country?" I refer to a decision by our own Supreme Court for an answer to this question, and also strong support for the conclusions which I have reached in this cause.

IN RE ESTATE OF BERNICE PAUAHI BISHOP, 11 Haw. 33, deals with one of the annual reports provided for in the language above quoted, to be presented to the Chief Justice of the Supreme Court. This was in the year 1897, four years after the Supreme Court had been stripped of its previously existing equity and probate jurisdiction. The report having been so presented, the Chief Justice (Hon. A. Francis Judd), referred the accounts to a master, who made a report thereon. The trustees took exception to the master's report, and, on a hearing the Chief Justice sustained the master's finding and report, and the trustees appealed to the Supreme Court. The Chief Justice, being disqualified to sit upon the appeal in a case involving his individual or personal rights and authority under the will, Circuit Judge Carter was called to the bench in his place, and the Court by which the question was unanimously decided, consisted of the late Justices Frear and Whiting, [32] and Circuit Judge Alfred W. Carter, who, by a somewhat remarkable coincidence happens to be one of the trustees in whose behalf the claims above recited are

now put forth in the case at bar. The opinion was written by Mr. Justice Whiting, and, on p. 34 of the report he states, as the first point involved, the following:

“Had the Chief Justice as a judge or court, any power or authority to hear and decide upon the matters submitted to him under the will?” and, as the sole remaining point:

“Is there any appeal from the decision of the Chief Justice of the Supreme Court to the Supreme Court itself?”

AND THE COURT, after disposing of the second point by a decision in the negative, uses language at pp. 35–36, from which I take the privilege of quoting liberally, as follows:

“As to the first question raised, we are of opinion that the Chief Justice had no judicial jurisdiction to hear and determine, as a court or judge, the matters presented to him, and at most he could be, while acting thereon, a mere arbitrator or referee, and the record made cannot be considered as a judicial record of the Supreme Court or a Justice thereof, and it is void as a judicial decision. Prior to the Act of 1892, Chap. 57, the Chief Justice might well have been considered as acting as a judge with jurisdiction over the subject matter, for he then was invested with original jurisdiction in probate and equity, and could hear such matters at chambers, and there was an appeal from the decisions rendered by a single Justice to the Supreme Court.

“It is claimed that the necessary jurisdiction is conferred on the Chief Justice by the will, but this can only be advanced on the theory of jurisdiction being conferred by consent of parties. Parties can only confer jurisdiction *in personam* by consent, but where the court has no jurisdiction of the subject matter, no consent of parties can give jurisdiction.

“12 Am. & Eng. Encyc. of Law, 300, *et seq.*

“The Judges of the Circuit Courts at Chambers have original jurisdiction in probate and equity, and all [33] such matters pending in the Supreme Court were transferred to the Judges of the First Circuit Court by the Act of 1892. And I am of opinion that the annual accounts of the trustees should have been presented to a Judge of the First Circuit Court for settlement, as it was one of the matters annually pending in the Supreme Court, and so transferred by the Judiciary Act of 1892. Further, the Chief Justice of the Supreme Court being now without jurisdiction in this matter, I am of opinion that the language in the will (providing for the report to the Chief Justice) ‘*or other highest judicial officer in this country*’ can without forced construction mean ‘other highest judicial officer’ *having judicial jurisdiction* over the subject matter of the same nature as this,—that is, annual settlement of trustees’ accounts under a will probated hereto-

fore in the Supreme Court; and that such highest judicial officer would now be one of the Judges of the First Circuit Court. Our procedure and practice has been that the probate court in which a will containing provisions for trustees to hold and manage the property bequeathed for trust purposes, has been probated, retains jurisdiction over such trusts and requires annual accounts of the trustees to be rendered and passed upon. As to trusts other than those in probate, a court of equity has general jurisdiction. Mr. Justice Frear and Judge Carter, however desire to express no opinion on the views set forth in this paragraph."

THE ILLINOIS DOCTRINE, as I interpret it, is entirely favorable to the view which I have taken here. The earliest case in that jurisdiction which we find cited in *Morrison v. Kelly*, 22 Ill. 609. It was an action in ejectment, and involved the validity of the appointment by the Circuit Court of La Salle County of a trustee to fill a vacancy arising in a trust created by deed. The deed conferred such power of appointment upon "the Court of Chancery of the judicial district or circuit in which La Salle County shall then be situated." That court, acting judicially, appointed Morrison as trustee in place of a deceased trustee, and the decree purported to vest in the new trustee the legal title, etc. The Supreme Court (p. 623), used this language:

"It will not be contested that a grantor conveying to a trustee, may confer upon an officer,

as the Chief Executive of the State, a Circuit Judge, a Probate Judge, or upon any Court of Record, the power to [34] appoint a trustee in the event of the death of the trustee named in the deed. Then, if it was the object of the clause in this deed to confer upon the Circuit Court of La Salle, such a power, as soon as Reed's death occurred, the Court became invested with jurisdiction to appoint a trustee, and such jurisdiction would not depend upon acquiring jurisdiction of his heirs or personal representatives."

IN *Leman v. Sherman*, 117 Ill. 657, 664, the rule which might be implied from the above quoted language in the *Morrison* case, wherein the court states that "any Court of Record" may be the donee of such power, was modified and limited to Courts of Record invested with either such general equity jurisdiction or such statutory jurisdiction, either in equity or in probate, as authorize them to make such appointments.

In the *Leman v. Sherman*, case which was a bill in equity for the removal of Leman as trustee of the Sherman estate, and for the appointment of a new trustee in his place, the interests involved were large, including the famous Sherman House Hotel in Chicago, and the case was elaborately presented. The trust involved was a testamentary trust, to one Marsh, with the provision that, "in case of the death, resignation, refusal or inability to act of said trustee, I hereby direct that a new trustee be ap-

pointed by the *County Court* of said County, upon the application of any person interested, and the notice to all persons interested," etc. Marsh acted under the trust for some years and then resigned. In 1875, the County Court appointed one Taylor to the trusteeship as successor to Marsh. Taylor served until 1881, when he died. Promptly thereafter a daughter of the testator filed her petition in the *County Court* of Cook County, asking for the appointment of a trustee as successor to Taylor, and for summons in chancery to bring in all the defendants, which was done. Soon thereafter the *County Court* entered an order in said proceeding, sustaining the petition, and decreeing "that the prayer of the bill of complaint be, and the same is hereby granted, and that Henry W. Leman be, and he is hereby appointed as successor in said trust to George Taylor," and purporting to vest title to the trust property in said Leman as such trustee. Leman qualified and entered upon the discharge of the trust, and the plaintiff, Sherman, brought this suit to procure his removal as such trustee and the appointment of another in his place. One of the points insisted upon by the plaintiff was "that the power of appointment conferred upon the County Court by the will, and the exercise of that power by the County Court, in the appointment of appellant (Leman), in the manner already indicated, are illegal and void." [35]

IT IS ONLY in this latter point and the manner of its disposition, that we are interested in the present case. The Supreme Court, in its opinion, says:

“The testator, undoubtedly, intended to confer the power of appointing a successor to the trustee, named by him, upon the County Court, *as organized when his will was made*. At that time, the County Court had jurisdiction in all matters of probate and the settlement of estates of deceased persons. It was, unquestionably, his intention to authorize the appointment to be made by the same Court in which his will would be admitted to probate, his executors would be qualified, and his estate would be administered upon. Since his death, however, a new Probate Court has been created in Cook County, and all jurisdiction, in matters of probate, has been taken away from the County Court, so called. Appellant’s appointment was made by the County Court as it existed after its probate jurisdiction was taken from it, and vested in the newly created Probate Court. It is very evident, therefore, that, however necessary it may be to consider and give effect to the actual intention of the testator in the interpretation of his will, it was never really his intention to confer the power of appointment upon the County Court, as it was organized, when the order of April 15, 1881, was entered. Independently, however, of this consideration, neither the County Court, which existed when the testator made his will, and at the time of the death, nor the County Court which assumed to make appellant the trustee of the estate, could lawfully exercise the power conferred by

this will. It is sought to uphold the power, on the ground, that it was conferred upon the Judge of the Court, and not upon the Court itself. *Where it is manifestly the intention of the testator* to name the particular individual, who holds the office of Judge, as the donee of the power, his designation as Judge of a Court will be disregarded as mere *descriptio personae*, and the power will be sustained, as vested in the man, and not in the office. No such construction however, can be given to the language of the will, now under consideration. The power of appointment was intended to be conferred upon the County Court of Cook County, *as a tribunal*. Such is the plain import of the words used.” [36]

AND SO, in the case at bar, I feel that the language above quoted, especially that with reference to the manifest intention of the testator that the appointment of successive trustees should rest *in the Court in which his will should be probated*, etc., is peculiarly applicable and significant. Again, if the phrasing of Mrs. Bishop’s will had been such, as, in the language of the Illinois Court (slightly paraphrased to fit the facts), to stamp it as having been “manifestly the intention of the testatrix to name the particular individuals who hold the offices of Justices of the Supreme Court, as the donees of the power,” a different conclusion might be warranted herein.

THE MISSOURI DOCTRINE is set forth in *Harwood v. Tracy*, 118 Mo. 631, 636-7-8. That

was an action in ejectment, involving the validity of the appointment of a trustee to fill a vacancy, under a trust created by deed. The trustee named in the deed was authorized to lay out a town plan, said town to be known as "Careron," and all deeds to be made in the name of the "Cameron Town Company." The provision for the appointment of a successor was that in the event of the death or removal from the County of Clinton * * * or the resignation of said trustee, or if, from other cause, he or any successor of his should in the opinion of the majority of the members of said Company in interest become disqualified for the performance of his duties as such trustee—the *County Court of Clinton County, Missouri, may, and is hereby requested, upon the application of any one member of the Company to appoint, etc., a successor, with provisions for the acceptance of the trust by such successor, and his qualifying by the giving of bonds, etc.* If the County Court of Clinton should refuse or fail to execute such request, a majority of the Company in interest or their personal representatives, might select a trustee under the above-named conditions.

THE DEED OF TRUST was executed in 1855. In 1856, the trustee appointed by the deed having resigned, certain other parties interested in the property filed in the County Court of Clinton County their request for the appointment of a successor by such Court. And the Court, consisting of several judges, proceeded to act upon said request, judicially, and appointed the nominee named in said request, who accepted the appointment and quali-

fied. The principal points involved were whether the record of said proceedings had in the County Court were properly admitted in evidence, over objection by the defendant, and whether a deed thereafter executed by the appointee of the Court, one Baubie, as such trustee, conveyed title. The decision, while recognizing, as a host of such decisions do that "one who creates a trust may mold into it whatever form he pleases," and that he may provide in any manner suitable to him, for the appointment of trustees, either originally, or to fill vacancies, and that such provision will be enforced by the courts, if it be a legal [37] one, and that "the Courts of Chancery delight to effectuate the intention of the testator or grantor," proceeds to define the "one limitation upon this power of appointment or revocation"; it must be conferred upon a person, corporation or agency, not incapable, legally, of performing it; And the opinion proceeds:

"This record presents a case of a power conferred upon an inferior court, a court having no chancery or equity powers, either when the deed was executed, or since that time. Three distinct lines of cases may be found, in which courts have been appointed and empowered to fill vacancies in trusts: (1) If the Court was invested by the law of its creation with equity powers, there seems to be no doubt of its power to perform the function of supplying a trustee, for this would merely effectuate in part the purpose of its creation. *Morrison v. Kelly*, 22 Ill. 610; *Leman v. Sherman*, 117 Ill. 657; 1 *Perry*

on Trusts, Sec. 296. (2) In the second class, where it is manifestly the intention of the donor in the trust or the testator, to name the individual who is or may be the judge of a court, as the donee of the power, his designation as judge will be construed as mere *descriptio personae* and the power sustained, as in the cases of powers conferred upon other public functioners, the official characters being construed simply as equivalent to naming them by their proper names. (Same citations, adding *People v. Morgan*, 90 Ill. 558.) (3) The third class, and the one under which this case, in our opinion, falls, is where the donor attempts to vest the power in a court that has no jurisdiction by the law of its creation, to take such an appointment. In such a case it is held that the appointment is void. That the grantor, testator or donor cannot by his consent confer this jurisdiction upon the court."

IT WILL BE OBSERVED that the language of the court as respects the first two classes of cases above described is *obiter dicta*, notwithstanding which fact, I have no quarrel with the legal postulates therein set forth; but it must be remembered that we are here dealing with a case where the original donation of power was to a court which, at the date of the will, and for nearly a decade thereafter, was invested by the law of its creation with equity powers, and was therefore valid, while the law remained in that condition. But upon the withdrawal from the Supreme Court and the Justices [38]

thereof, by the Judiciary Act of 1892, of all equity, probate and other jurisdiction at chambers, the donation lost its force expired, and could no longer be exercised by the Supreme Court or its Justices any more than if that Court and its Justices had been originally ineligible or disqualified to exercise the power of appointment.

A FURTHER EXCERPT from the opinion of the Missouri case becomes interesting in view of the fact that, as held at an earlier place in this opinion, our Supreme Court entertained jurisdiction of the resignation of W. O. SMITH, addressed to it *as a Court*, and that the order which it promulgated in the premises is entered and signed by the clerk in the same manner as other judicial decrees or orders. The language referred to, in the Missouri opinion, is this (p. 639):

“In such a case it is our duty to give the words used their ordinary signification, and hold that when he (the grantor) said *Court* he meant *a Court*. Beyond all question, it was so interpreted by the County Court itself. It took cognizance of the matter as a duly organized judicial body. It made or attempted to make its appointment by an entry on its record, *the only manner in which, as a Court, it could speak.*” (Last Italics are mine.)

“If it be said that innocent parties might suffer, the answer is, the danger is no greater in this than in thousands of other instances in which parties are mistaken in title. The power was attempted to be executed by the County

Court, whose jurisdiction is defined by public laws, of which all persons are bound to take notice.”

THE TESTATRIX in this case “took notice” of the jurisdiction of the Supreme Court and of its Justices, to appoint trustees. But this Court, at the present juncture, is obliged to “take notice” that the jurisdiction in question has been withdrawn from the Supreme Court and its Justices, and conferred upon this Court, sitting in equity.

THERE IS A RHODE ISLAND decision which impinges slightly, but directly upon the principles here involved—*Griswald v. Sackett*, 21 R. I. 206. It was a bill in equity for the appointment of new trustees to fill vacancies in a board named by a testator, and was heard on a demurrer to [39] the bill, setting up a manner of filling those vacancies provided for in the will, as exclusive of other powers of appointment. The original scheme of appointment fell through, and became inoperative because the surviving trustee refused to join in the application to the court for such appointment, which application was provided for in the will. The defendants claimed that until such survivor should join in such petition there was no authority or jurisdiction in the court to make such appointment. But the court, in overruling the demurrer, held as follows:

“The provision for the appointment contained in the will has become ineffectual, but the court has power to make the appointment under its general chancery jurisdiction.”

IT IS NEEDLESS TO MULTIPLY AUTHORITIES upon this point, but *Leman v. Sherman*, 117 Ill. p. 657, is directly in point.

“When a power of appointment is conferred upon another, and the mode of its execution is defined, the power can be exercised only in strict conformity with the terms of the grant. . . . If there be any irregularity in the mode of exercising the power, the appointment will be void.”

39 Cyc. pp. 274-5;

Sugden on Powers (1st Am. Ed.), pp. 210, 211.

THE ENTIRE SUBJECT of the appointment of new trustees under a power in the instrument is dealt with in the Cyclopedias as follows: 39 Cyc. 271 et seq.; 28 Am. & Eng. 961, 964, et seq.

A VIEW CONTRARY to that which I have herein expressed is found in *Moore v. Isbel*, 40 Iowa, 383, 386, et seq. That was a suit in chancery to set aside the title of defendants to certain lots in Sioux City, based upon a sale and conveyance under a trust deed. Many circumstances of misrepresentation and other fraud are alleged against one Leech, who pretended to act as trustee in making the sale sought to be set aside. The deed provided that “in the case of the death, disability or refusal of the said Campbell (trustee named in the deed) to act, then the acting County Judge of the County Court of Woodbury County was authorized and requested to appoint a suitable person to act as such trustee,” etc. [40] Without any resignation or refusal to act on the part of Campbell, there was an applica-

tion to the County Court to appoint Leech as trustee in his place. The County Court, acting judicially, undertook and purported to appoint Leech to the alleged vacancy; and the Court held that the appointment by the Court, as such, would be upheld, under the circumstances although, it further held that the donation of power was to the Judge, and not to the Court, and that the appointment of the Court, presided over by the Judge, "will not be defeated because it is witnessed by the record of the County Court. The record is the evidence of the act of the County Judge, and shows that he exercised the power conferred by the trust deed." The decision seems to have gone off upon the effect of the word "acting," prefixed to the phrase "County Judge." The results arrived at by the Iowa Court appear to me to have been so grossly violative of all the principles of equity, when considered in relation to the many violations by the appointee of the Court, acting as such trustee, of the terms and spirit of the trust deed, that I can feel no confidence in the decision, even upon the point that it is here involved, and I therefore reject it, and "cast it over among the rubbish."

I HAVE RESERVED until the last the citation and discussion of what I consider the strongest case in support of the decision at which I have arrived. It is *Carr v. Corning*, 73 N. H. 362; 62 Atl. 168. There were two cases between the same parties, and they were considered together, one being a bill in equity for the construction of the will of one Pearson, and the other a petition for mandamus to com-

pel the defendant (who was the Judge of the Probate Court for Merrimack County), to consider and pass upon a petition filed by the plaintiffs in the Probate Court for that County. The will in question provided for the filling of vacancies in the board of trustees, as follows:

“The remaining trustees or trustee shall nominate and appoint in writing a successor or substitute to fill such vacancy, said appointment to be approved by the Judge of Probate for the County of Merrimack *for the time being*. (Italics are mine.)

A VACANCY occurred, and the plaintiffs, being the surviving trustees, duly nominated a suitable person as successor and filed in the Probate Court for Merrimack County, a petition requesting that the appointment be approved. The [41] defendant, who was the Judge of Probate, declined to consider the petition in his judicial capacity, but as an individual expressed his disapproval of the appointment, and these actions were thereupon brought.

LET IT BE NOTICED that this is the latest decision in point of time of any that has been cited in Court upon the argument herein, or that the Court has been able to exhumate from the recesses of published reports. It was decided in October, 1905. A very able and exhaustive brief was filed on behalf of the defendant, in which many of the cases hereinbefore cited, as well as numerous others, were cited and commented upon. In particular, I call attention to the fact that the decision in *Shaw v. Paine*, 12 Allen, 293, relied upon by the trustees herein, was

before the Court, but does not appear to have met with its approval. The Supreme Court summarizes (p. 365) the contentions of the defendant (the Judge of Probate), as follows:

“The defendant says (1) the power of approval is vested in him in his individual and not in his official capacity; (2) if it was the intention of the testator that the Probate Court should approve the appointment, the power of appointment fails because it is an attempt to confer upon the Court a jurisdiction not conferred by law.”

THE FIRST POSITION of defendant above, is disposed of by the Court in stating that in the New Hampshire statutes pertaining to Courts of Probate, etc., the words “Judge” and “Judge of Probate” are constantly used when it is apparent the Probate Court is intended—and cites some examples, saying:

“It is a matter of common knowledge that when a person attending to probate business or considering probate matters speaks of referring anything to the Judge of Probate, he usually intends the Probate Court, and not the person who exercises the function of that office. That is probably the sense in which Mr. Pearson used the words in his will, for the Probate Court has jurisdiction of wills and the estates of deceased persons. When he provided that the persons who were to administer the trust he was creating should be approved by the Judge of Probate, there is a [42] presumption that

the Probate Court was intended; and the fact that the law makes it the duty of that Court to approve the appointment of trustees, makes that presumption so strong that the mere addition of the words 'for the time being' is not enough to rebut it."

DEFENDANT'S second postulate, viz., that if it was the intention of the testator that the Probate Court should approve the appointment, the power of appointment fails, for lack of jurisdiction in the Court to so appoint, is treated by the Court as unsound, and the Court cites the statute provisions which authorize the Probate Court to make such appointment. The opinion closes as follows:

"Since the law makes it the duty of the Probate Court to approve trustees named in a will before appointing them, it is obvious that the mere fact that the testator made it the duty of the Probate Court to approve trustees named in accordance with the provisions of the will does not make it illegal for the Court to approve it, for it cannot be illegal for the Court to do its duty merely because some one requests it."

IF THIS OPINION has been extended to lengths which may appear unreasonable, such extension is due, in part, to the fact that I have been unable to find leisure in which to adequately condense it. Dwight Moody, the famous Evangelist, when criticised for the length of his sermons, is said to have replied: "I have not time to make them any shorter." Realizing the magnitude of the interests at stake, and appreciating that my conclusions

herein “fly in the face” of all procedure and precedent that have been observed in the filling of previous vacancies (since the going into operation of the Judiciary Act of 1892), and being further mindful of the fact that these conclusions are opposed to those reached and submitted to the Court by the *Amici Curiae* who so courteously and ably examined and argued the question at bar, I have felt it due not alone to myself, but to the opinions of those gentlemen, to examine these matters at length, and to point out, to the best of my ability, the reasons which induce me to disregard their advice as to the condition of the law involved. I therefore summarize my conclusions as follows:

1. That the power of appointment of trustees to fill [43] vacancies in the board created in and by the Will of MRS. BISHOP was, in and by said Will, conferred upon the Supreme Court of the Hawaiian Islands, as a judicial tribunal, and acting in its judicial capacity;

2. That, at the date of said Will, and thence until January 1st, 1893, said Supreme Court was invested with all the jurisdiction and powers necessary to the choice and appointment of such trustees;

3. That said power of appointment was not conferred upon the individuals who might, at any given period, chance to fill the offices of a majority of the Justices of the Supreme Court, acting in their individual, as distinguished from their judicial capacity.

4. In the alternative, that if said power was so conferred upon such Justices as individuals, it ex-

tended and extends, by virtue of said Judiciary Act, only to the point of choosing and nominating trustees to fill such vacancies for approval or disapproval, by the Circuit Court, or a Judge thereof, sitting in Equity;

5. That by virtue of the transfer from the Supreme Court to the Judges of the several Circuit Courts of the Equity jurisdiction previously existing in said Supreme Court, and its several Justices, which transfer was effected by said Judiciary Act, said Supreme Court has not, since December 31st, 1892, possessed the jurisdiction or authority to choose or appoint such trustees;

6. That the jurisdiction and authority to appoint such trustees having been lost by the Supreme Court, by statutory enactment, it is now vested in the Judges of the First Circuit Court, sitting in Equity, as a part of their general equity jurisdiction;

7. That, as the Judge of said Circuit Court now having charge of the Equity calendar, and "sitting in Equity," said jurisdiction and authority pertains and belongs to me;

8. In the alternative, if a majority of said Justices of the Supreme Court, acting individually, and not judicially, were invested with, and still retain the jurisdiction and authority to choose and nominate to this Court, sitting in Equity, for its approval or disapproval, a trustee or trustees to fill such vacancy, and if the naming of WILLIAM WILLIAMSON be regarded as such a choice and nomination, then said choice [44] and nomination are

hereby respectfully disapproved, for reasons set forth in an earlier part of this opinion;

9. That inasmuch as a vacancy in said board of trustees now exists owing to the resignation of SAMUEL M. DAMON as such trustee, and the judicial acceptance thereof, and as this Court has acquired jurisdiction in the premises by virtue of the petition or request of the remaining trustees for the confirmation of Mr. WILLIAMSON, it is appropriate that this Court should now make an appointment of such trustee to fill such vacancy.

10. WHEREFORE, by virtue of all the rights and powers me in anywise enabling in this behalf, I do hereby appoint CHARLES E. KING, an *Alumnus* of said Kamehameha School, of the first class graduated therefrom, to wit: the class of 1891, this appointment to become effective upon said appointee furnishing proofs satisfactory to the Court that he is a person of the Protestant religion, and upon his qualifying for said position, by entering into a joint and several bond to and with his associate trustees herein, in the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00).

A DECREE to this effect will be signed upon presentation.

Dated at Honolulu, this 29th day of July, 1916.

[Seal] (Signed) C. W. ASHFORD,

First Judge.

[Endorsement]: Eq. No. 2048. Reg. 2, pg. 297. Circuit Court, First Circuit, Territory of Hawaii, at Chambers—In Equity. In the Matter of the

Resignation of Samuel M. Damon, as a Trustee Under the Will and of the Estate of Bernice Pauahi Bishop, and the Appointment of a Successor to Said Trustee. Opinion and Decision. Filed at 10:20 o'clock A. M. July 29th, 1916. (Signed) J. A. Dominis, Clerk. [45]

*In the Circuit Court of the First Judicial Circuit of
the Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

APPOINTMENT OF TRUSTEE—EQUITY No.
2048.

In the Matter of the Resignation of SAMUEL M. DAMON, as a Trustee Under the Will and of the Estate of BERNICE PAUAHI BISHOP, and the Appointment of a Successor to Said Trustee.

Decree.

The petition of William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, the remaining trustees under the will and of the estate of Bernice Pauahi Bishop, deceased, praying the confirmation by this court of the appointment by the Honorable the Chief Justice and the Honorable the Associate Justices of the Supreme Court of the Territory of Hawaii, of William Williamson, as a trustee under the said Will and of the said estate, in place and in succession to Samuel M. Damon, resigned, coming on regularly for hearing before me, the undersigned First Judge of the Circuit Court of

the First Judicial Circuit of the Territory of Hawaii, presiding at Chambers in Equity, this 15th day of June, A. D. 1916, when the petitioners appearing by their attorneys and solicitors, Clarence Olson and Paul J. Bartlett, Esquires, and D. L. Withington, Antonio Perry and A. S. Humphreys, Esquires, appeared as *amici curiae*, and E. C. Peters, Esquire, upon permission of the court first had and obtained, appeared on behalf of strangers against said petition;

And evidence, both oral and documentary, having been introduced [46] on behalf of said petition and the same having been submitted and the Court now being fully advised in the premises;

THE COURT NOW FINDS AS CONCLUSIONS OF FACT:

First: That there are now but four (4) trustees under the will and of the estate of Bernice Pauahi Bishop, deceased.

Second: That a pretended and purported appointment of the said William Williamson as a trustee under the will and of the estate of said decedent, in place of and in succession to Samuel M. Damon, resigned, was heretofore made by the Honorable the Chief Justice and the Honorable the Associate Justices of the Supreme Court of the Territory of Hawaii, writing, dated June 9th, 1916;

Third: That the said William Williamson is in all respects qualified for such appointment, save one, namely: That it has not been made to appear that he is so qualified by length of residence in Hawaii

or by familiarity and sympathy with the history, manners, customs, language, ideals and aspirations of the Hawaiian people as to mark him out as a fit and suitable person to be appointed to an office where he will be authorized and expected to exercise a wise, benevolent and sympathetic discretion with reference to the education of Hawaiian youth of either sex, and concerning the general scheme, system and regulations to be adopted and observed during their attendance at the schools established un-

(S.) C. W. A.
1st Judge.

by

der the trust of said will created, and hence the said William Williamson for that reason is not a fit and proper person for such appointment.

Fourth: That Charles E. King, Esquire, is a person of the Protestant religion and is a fit and proper person to be appointed such trustee.

IT IS FURTHER BY THE COURT FOUND AS CONCLUSIONS OF LAW:

First: That the power of appointment of trustees to fill [47] vacancies in the board created in and by the will of Bernice Pauahi Bishop, deceased, was in and by said will conferred upon the Supreme Court of the Hawaiian Islands as a judicial tribunal and acting in its judicial capacity.

Second: That, at the date of said Will, and thence until January 1st, 1893, said Supreme Court was invested with all the jurisdiction and powers necessary to the choice and appointment of such trustees;

Third: That said power of appointment was not conferred upon the individuals who might, at any given period, chance to fill the offices of a majority

of the Justices of the Supreme Court, acting in their individual, as distinguished from their judicial capacity;

Fourth: In the alternative, that if said power was so conferred upon such Justices as individuals, it extended and extends, by virtue of said Judiciary Act, only to the point of choosing and nominating trustees to fill such vacancies for approval or disapproval, by the Circuit Court, or a Judge thereof, sitting in Equity;

Fifth: That by virtue of the transfer from the Supreme Court to the Judges of the Several Circuit Courts of the Equity jurisdiction previously existing in said Supreme Court, and its several Justices, which transfer was effected by the Judiciary Act of 1892, Ch. 57, said Supreme Court has not, since December 31st, 1892, possessed the jurisdiction or authority to choose or appoint such trustees;

Sixth: That the jurisdiction and authority to appoint such trustees having been lost by the Supreme Court, by statutory enactment, it is now vested in the Judges of the First Circuit Court, sitting in Equity, as a part of their general equity jurisdiction.

IT IS THEREFORE HEREBY ORDERED,
ADJUDGED AND DECREED:

First: That the purported and pretended appointment [48] of William Williamson as a trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, by the Honorable the Chief Justice and Associate Justices of the Supreme Court of the Territory of Hawaii in place of and in suc-

cession to Samuel M. Damon, resigned, and dated the 9th day of June, A. D. 1916, be and the same is hereby declared null and void and of no force (and) or effect.

Second: That the purported and pretended appointment of William Williamson, considered as the "choice" of a majority of the Justices of the Supreme Court of the Territory of Hawaii, of the said William Williamson, to the office of trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, in the place of and in succession to Samuel M. Damon, resigned, be and the same is hereby disapproved and rejected.

Third: That Charles E. King be and he is hereby appointed a trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, in the place of and in succession to Samuel M. Damon, resigned, to act jointly with William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, the remaining trustees, for all the purposes of the said will and the trusts thereby created, such appointment to become effective upon said Charles E. King filing in this court a joint and several bond with his associate trustees herein, in the sum of \$100,000.00, or in the alternative a good and sufficient bond with surety approved by this court in the sum of \$20,000.00.

Fourth: That there be and there is hereby vested in said Charles E. King and the said William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, as trustees under the will and of the es-

tate of Bernice Pauahi Bishop, deceased, as joint tenants for the purposes and upon the trusts thereof, all and singular the property, real, personal or mixed now subject to [49] the will and of the estate of the said Bernice Pauahi Bishop, deceased.

Fifth: That the petitioners pay the costs of this proceeding.

Done at Chambers in the Judiciary Building in Honolulu, City and County of Honolulu, Territory of Hawaii, this third day of August, A. D. 1916.

(Seal) (Signed) C. W. ASHFORD,
First Judge of the Circuit Court of the First
Judicial Circuit of the Territory of Hawaii,
Presiding at Chambers in Equity.

[Endorsement]: Eq. 2048. Reg. 2, pg. 297. Equity No. —, Circuit Court, First Circuit, Territory of Hawaii. In the Matter of the Resignation of Samuel M. Damon as a Trustee Under the Will and of the Estate of Bernice Pauahi Bishop, and the Appointment of a Successor to Said Trustee. Decree. Filed 2:31 o'clock P. M. August 3, 1916. (S.) Huron K. Ashford, Clerk. E. C. Peters, 210-211 McCandless Building, Honolulu, T. H., Attorney for ———. [50]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

AT CHAMBERS—IN EQUITY.

APPOINTMENT OF TRUSTEE—EQUITY NO.

2048.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Notice of Appeal and Appeal by the Trustees.

Come now William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, the petitioners in the above-entitled cause, and hereby give notice of appeal, and do hereby appeal, to the Supreme Court of the Territory of Hawaii, from the decision and decree made and entered in said cause by the Honorable C. W. Ashford, First Judge of the Circuit Court of the First Circuit, Territory of Hawaii, at Chambers, in Equity.

Dated, Honolulu, T. H., August 3d, 1916.

WILLIAM O. SMITH,
E. FAXON BISHOP,
ALBERT F. JUDD, and
ALFRED W. CARTER,
Said Petitioners.

By (Signed) HOLMES & OLSON,
Their Attorneys.

[Endorsement]: Eq. Reg., pg. 297. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. At Chambers—In Equity. In the Matter

of the Estate of Bernice Pauahi Bishop, Deceased.
Notice of Appeal and Appeal. Filed at 3:30 o'clock
P. M., August 3d, 1916. (S.) B. N. Kahalepuna,
Clerk. Holmes & Olson, 863 Kaahumanu St., Hono-
lulu, Attorneys for Petitioners. [51]

Certificate of Proof of Will.

Supreme Court of the Hawaiian Islands.

IN PROBATE.

I, LAWRENCE M'CULLY, Justice of the said
Supreme Court, do hereby certify:

That on the 2d day of December, A. D. 1884, the
annexed instrument was admitted to probate as the
Last Will and Testament of BERNICE PAUAHI
BISHOP, deceased; and from the proofs taken and
the examinations had therein, the Court finds as
follows:

That said BERNICE PAUAHI BISHOP died
on or about the 16th day of October, A. D. 1884, that
at the time of her death she was a resident of Hono-
lulu, Oahu, that the said annexed Will was duly
executed by the said decedent in her lifetime in
Honolulu, in the presence of Frederick W. Macfar-
lane and Francis M. Hatch, the subscribing witnesses
thereto; also, that she acknowledged the execution of
the same in their presence and declared the same to
be her Last Will and Testament, and the said wit-
nesses attested the same at her request and in her
presence; that the said decedent, at the time of exe-
cuting said Will as aforesaid, was of full age, of
sound and disposing mind, not under restraint, un-

due influence or fraudulent misrepresentations, nor in any respect incompetent to devise and bequeath her Estate.

IN WITNESS WHEREOF, I have signed this Certificate and caused the same to be attested by the Clerk of this court, under the Seal thereof, this 2d day of December, A. D. 1884.

[Supreme Court Seal]

(Signed) L. M'CULLY,

Justice of the Supreme Court.

Attest: (Signed) Henry Smith,

Deputy Clerk.

[Endorsed]: Supreme Court in Probate. In the Matter of the Will of Bernice P. Bishop, Deceased. Certificate of Proof of Will. Issued the 2d day of December, A. D. 1884. (S.) Henry Smith, Dep. Clerk. [52]

Will of Bernice Pauahi Bishop, Deceased.

KNOW ALL MEN BY THESE PRESENTS, That I, BERNICE PAUAHI BISHOP, the wife of Charles R. Bishop, of Honolulu, Island of Oahu, Hawaiian Islands, being of sound mind and memory, but conscious of the uncertainty of life, do make, publish and declare this my last Will and Testament in manner following, hereby revoking all former wills by me made.

Law No. 7505. First. I give and bequeath unto my Plaintiff's namesakes, Bernice Bishop Dunham, niece Exhibit D. Filed Oct. 5, of my husband, now residing in San Joa- 1915. (S.) B. N. quin County, California, Bernice Parke, Kahalepuna Clerk. daughter of W. C. Parke, Esq., of Hono-

lulu, Bernice Bishop Barnard, daughter of the late John E. Barnard, Esq., of Honolulu, Bernice Bates, daughter of Mr. Dudley C. Bates, of San Francisco, California, Annie Pauahi Cleghorn, of Honolulu, Lilah Bernice Wodehouse, daughter of Major J. H. Wodehouse, of Honolulu, and Pauahi Judd, the daughter of Col. Charles H. Judd of Honolulu, the sum of Two Hundred Dollars (\$200.) each.

—Second— (Signed) BERNICE P. BISHOP.

Law No. 130 Plaintiff's Exhibit E. Filed May 15, 1906. (S.) M. T. Simonton, Clerk. Second. I give and bequeath unto Mrs. William F. Allen, Mrs. Amoe Haalelea, Mrs. Antone Rosa, and Mrs. Nancy Ellis, the sum of Two Hundred Dollars (\$200.) each.

Law No. 5265. Plaintiff's Exhibit D. Filed May 16, 1906. (S.) M. T. Simonton, Clerk. Third. I give and bequeath unto Mrs. Caroline Bush, widow of A. W. Bush, Mrs. Sarah Parminter, wife of Gilbert Parminter, Mrs. Keomailani Taylor, wife of Mr. Wray Taylor, to their sole and separate use free from the control of their husbands, and to Mrs. Emma Barnard, widow of the late John E. Barnard, Esq., the sum of Five hundred Dollars (\$500.) each.

[53]

Fourth. I give, devise and bequeath unto H. R. H. Liliuokalani, the wife of Gov. John O. Dominis, all of those tracts of land known as the "Ahupuaa of Lumahai," situated on the Island of Kauai, and the "Ahupuaa of Kealia," situated in South Kona, Island of Hawaii; to have and to hold for and during the term of her natural life; and after her decease to my trustees upon the trusts below expressed.

(Signed) BERNICE P. BISHOP.

Fifth. I give and bequeath unto Kahakuakoi (w) and Kealohapauole, her husband, and to the Survivor of them, the sum of Thirty Dollars (30.) per month, (not \$30. each) so long as either of them may live. And I also devise unto them and to the heirs of the body of either, the lot of land called "Mauna Kamala," situated at Kapalama, Honolulu; upon default of issue the same to go to my trustees upon the trusts below expressed.

Sixth. I give and bequeath unto Mrs. Kapoli Kamakau, the sum of Forty Dollars (\$40.) per month during her life; to my servant-woman Kaia the sum of Thirty Dollars (\$30.) per month during her life, and to —"— Nakaahiki (w) the sum of Thirty Dollars (\$30.) per month during her life.

Seventh. I give, devise and bequeath unto Kapaa (k) the house-lot he now occupies, situated between Merchant and Queen Streets in Honolulu, to have and to hold for and during

—the— (Signed) BERNICE P. BISHOP.

[54] the term of his natural life; upon his decease to my trustees upon the trusts below expressed.

Eighth. I give, devise and bequeath unto Auhea (w) the wife of Lokana (k) the house-lot situated on the corner of Richard and Queen Streets, now occupied by G. W. Macfarlane & Co.; to have and to hold for and during the term of her natural life; upon her decease to my trustees upon the trusts below expressed.

Ninth. I give, devise and bequeath unto my husband, Charles R. Bishop, all of the various tracts and parcels of land situated upon the Island of

Molokai, comprising the "Molokai Ranch," and all of the live-stock and personal property thereon; being the same premises now under the care of R. W. Myer, Esq.; and also all of the real property wherever situated, inherited by me from my parents, and also all of that devised to me by my aunt Akahi,

—except— (Signed) BERNICE P. BISHOP.
except the two lands above devised to H. R. H. Liliuokalani for her life; and also all of my lands at Waikiki, Oahu, situated makai of the government main road leading to Kapiolani Park; to have and to hold together with all tenements, hereditaments, rights, privileges and appurtenances to the same appertaining, for and during the term of his natural life; and upon his decease to my trustees upon the trusts below expressed.

Tenth. I give, devise, and —"— bequeath unto Her Majesty Emma Kaleleonalani, Queen Dowager, as a token of my good will, all of the premises situated upon Emma Street in said Honolulu, known as "Kaakopua," lately the residence of my cousin Keelikolani; to have and to hold with the appurtenances for and during the term of her natural life, and upon her decease to my trustees upon the trusts below expressed.

Eleventh. I give and bequeath the sum of Five Thousand Dollars (\$5000.)

—to— (Signed) BERNICE P. BISHOP.

[55]

to be expended by my executors in repairs upon

Kawaiahao Church building in Honolulu, or in improvements upon the same.

Twelfth. I give and bequeath the sum of Five thousand dollars (\$5000.) to be expended by my executors for the benefit of the Kawaiahao Family School for Girls, (now under charge of Miss Norton) to be expended for additions either to the grounds, buildings or both.

Thirteenth. I give, devise and bequeath all of the rest, residue and remainder of my estate real and personal, wherever situated, unto the trustees below named, their heirs and assigns forever, to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. I direct my trustees to expend such amount as they may deem best, not to exceed, however, one-half of the fund which may come into their hands,

(Signed) BERNICE P. BISHOP.

in the purchase of suitable premises, the erection of School buildings, and in furnishing the same with the necessary and appropriate fixtures, furniture and apparatus. I direct my ~~executors~~ trustees to invest the —"— remainder of my estate in such —"— manner as they may think best, and to expend the annual income in the maintenance of said schools; meaning thereby the salaries of teachers; the repairing —"— buildings and other incidental expenses; and to devote a portion of each year's income to the support and education of orphans, and others in indigent circumstances, giving the prefer-

ence to Hawaiians of pure or part aboriginal blood; the proportion in which said annual income is to be divided among the various objects above mentioned to be determined solely by my said trustees they to have full discretion. I [56] desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction—in— (Signed) BERNICE P. BISHOP.

in morals and in such useful knowledge as may tend to make good and industrious men and women; and I desire instruction in the higher branches to be subsidiary to the foregoing objects. For the purposes aforesaid I grant unto my said trustees full power to lease or sell any portion of my real estate, and to reinvest the proceeds and the balance of my estate in real estate, or in such other manner as to my said trustees may seem best. I also give unto my said trustees full power to make all such rules and regulations as they may deem necessary for the government of said Schools and to regulate the admission of pupils, and the same to alter, amend and publish upon a vote of a majority of said trustees.

I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures, and of the condition of said Schools
(Signed) BERNICE P. BISHOP.

to the Chief Justice of the Supreme Court, or other highest judicial officer in this country; and shall also file before him annually an inventory of the property in their hands and how invested, and to publish the same in some Newspaper published in said

Honolulu; I also direct my said trustees to keep said school buildings insured in good Companies, and in case of loss to expend the amounts recovered in replacing or repairing said buildings. I also direct that the teachers of said Schools shall forever be persons of the Protestant religion, but I do not intend that the choice should be restricted to persons of any particular Sect of Protestants.

(Signed) BERNICE P. BISHOP. [57]

Fourteenth. I appoint my husband Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke, and William O. Smith, all of Honolulu, to be my trustees to —"— carry into effect the trusts above specified. I direct that a majority of my said trustees may act in all cases, and may convey real estate, and perform all of the duties and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion.

Fifteenth. In addition to the above devise to Queen Emma, I also give, devise and bequeath to her, said Emma Kaleleonalani Queen Dowager, the Fish-pond in Kawaa, Honolulu near Oahu Prison, called "Kawa," for and during the term of her natural life; and after her decease to my trustees upon the trusts aforesaid.

Sixteenth. In addition to the above devise to my husband, I also give and bequeath to him, said

Charles R. Bishop all of my personal property of every description, including cattle at Molokai; to have and to hold to him, his executors, administrators and assigns forever.

(Signed) BERNICE P. BISHOP.

Seventeenth. I hereby nominate and appoint my husband Charles R. Bishop and Samuel M. Damon, executors of this my will.

In witness whereof I, said Bernice Pauahi Bishop, have hereunto set my hand and seal this thirty-first day of October A. D. Eighteen hundred and eighty-three.

(Signed) BERNICE P. BISHOP. (Seal)

The foregoing instrument, written on eleven pages, was signed, sealed [58] published and declared by said Bernice Pauahi Bishop, as and for her last will and testament in our presence, who at her request, in her presence, and in the presence of each other, have hereunto set our names as witnesses thereto, this 31st day of October A. D. 1883.

(Seal) (Signed) F. W. MacFARLANE.

(Signed) FRANCIS M. HATCH. [59]

Certificate of Proof of First Codicil to Will.

Supreme Court of the Hawaiian Islands.

IN PROBATE.

I, LAWRENCE M'CULLY, Justice of the said Supreme Court, do hereby certify:

That on the 2d day of December, A. D. 1884, the annexed instrument was admitted to probate as a Codicil to the Last Will and Testament of Bernice Pauahi Bishop deceased; and from the proofs taken

and the examination had therein, the Court finds as follows:

That said Bernice Pauhai Bishop died on or about the 16th day of October, A. D. 1884, that at the time of her death she was a resident of Honolulu, Oahu, that the said annexed Codicil was duly executed by the said decedent in her life-time in said Honolulu in the presence of William W. Hall and Francis M. Hatch the subscribing witnesses thereto; also, that she acknowledged the execution of the same in their presence and declared the same to be a Codicil to her Last Will and Testament, and the said witnesses attested the same at her request and in her presence; that the said decedent, at the time of executing said Codicil as aforesaid, was of full age, of sound and disposing mind, not under restraint, undue influence or fraudulent misrepresentations, nor in any respect incompetent to devise and bequeath her Estate.

IN WITNESS WHEREOF, I have signed this Certificate and caused the same to be attested by the Clerk of this court, under the seal thereof, this 2d day of December, A. D. 1884.

(Supreme Court Seal)

(Signed) L. M'CULLY,

Justice of the Supreme Court.

Attest: (Signed) Henry Smith,

Deputy Clerk. [60]

[Endorsed]: Supreme Court—In Probate. In the Matter of the Will of Bernice P. Bishop, Deceased. Certificate of Proof of Codicil. Issued the

2d day of December, A. D. 1884. (S.) Henry Smith, Dep. Clerk. [61]

**First Codicil to Will of Mrs. Bernice Pauahi Bishop,
Deceased.**

This is a Codicil to the last Will and Testament of me, Bernice P. Bishop, dated October thirty-first A. D. Eighteen hundred and eighty-three:

1st. I give and bequeath unto Mrs. William F. Allen the sum of One Thousand Dollars (\$1000.) in place of the amount given to her in my said will.

2d. I revoke the devise to Her Majesty Emma Kaleleonalani of the premises situated upon Emma Street in Honolulu, known as "Kaakohua," contained in the tenth article of my said will; and in place thereof I give, devise and bequeath unto her, said Emma Kaleleonalani, all of those parcels of land situated in Nuuanu Valley, Oahu, on both sides of the road, known as "Laimi"; to hold for and during the term of her natural life; and upon her decease to my trustees upon the trusts expressed in my said will. Said Emma to also have the fish pond known as "Kawa" as provided in the fifteenth article of my said will.

3d. In addition to the bequests to my husband named in my said will I also—

(Signed) BERNICE P. BISHOP.

also give, devise and bequeath unto my said husband, Charles R. Bishop, the land known as Waialae-nui, as well as Waialae-iki, and also the land known as "Maunalua," Island of Oahu; and also all of the premises situated in said Honolulu, known as the Ili of "Kaakopua," extending from Emma

to Fort Street and also all Kuleanas in the same, and every thing appurtenant to said premises, to hold for his life; remainder to my trustees.

4th. I give, devise and bequeath unto Kuaiwa (k) and Kaakaole (w), old retainers of my parents, that piece of land now occupied by them, situated in upper Kapalama, in said Honolulu, called "Wailuaakio"; to have and to hold for and during the term of their natural lives and that of the survivor of them; remainder to [62] my trustees upon the trusts named in my said will.

5th. I give, devise and bequeath unto Kaluna (k) and Hoopii, his wife, those premises now occupied and cultivated by them in Kauluwela, Liliha Street, Honolulu; to have and to hold for and during the terms of their natural lives and that of the survivor of them;

(Signed) BERNICE P. BISHOP.

remainder to my trustees upon the trusts named in my said will.

6th. I give, devise and bequeath unto Naiapaa-kai (k) and Loika Kahua his wife, that lot of land now enclosed and occupied by them, in Kauluwela in said Honolulu, the size of said lot not to exceed one acre; to have and to hold for and during the term of their natural lives, and that of the survivor of them; remainder to my trustees upon the trusts named in my said will.

7th. I give and bequeath unto Lola Kahailiopua Bush, of said Honolulu, the sum of Three hundred Dollars (\$300.) per year during her minority, to be

applied towards her education and clothing; and upon her becoming of age the sum of One thousand Dollars (\$1000.) to her sole and separate use, free from the control of any husband she may marry.

8th. I give and bequeath unto Bernice B. Barnard, of said Honolulu the sum of Three hundred Dollars (\$300.) a year during her minority, to be applied towards her education and clothing—

(Signed) BERNICE P. BISHOP,
clothing; and upon her becoming of age the sum of One thousand Dollars (\$1000.) to her sole and separate use, free from the control of any husband she may marry. This in lieu of the \$200. given by my will.

9th. I give, devise and bequeath unto my friend Samuel M. Damon, of said Honolulu, all of that tract of land known as the [63] Ahupuaa of Moanalua, situated in the District of Honolulu, Island of Oahu; and also the fishery of Kaliawa; to have and to hold with the appurtenances to him, his heirs and assigns forever.

10th. I give and bequeath unto my servants Kaleleku (k) and Kaoliko (k) his brother, each the sum of Twenty Dollars (\$20.) per month ~~each~~, during the term of the natural life of each of them.

11th. I revoke so much of the fifth article of my said will as devises the land known as “Mauna Kamala” to Kahakuakoi (w) and Kealohapauole her husband; and in lieu thereof I give, devise and bequeath unto said Kahakuakoi (w) and Kealohapauole (k) all

(Signed) BERNICE P. BISHOP.

all of that tract of land known as Hanohano, situated at Ewa, Island of Oahu, formerly the property of Puhalahua; to have and to hold as limited in said fifth article of my said will.

12th. I give and bequeath unto the Bishop's School in Honolulu, called "Iolani College," the sum of Two thousand Dollars (\$2000.); and to the English Sisters' School called "St. Albans Priory" the sum of Two thousand Dollars (\$2000.); and to "St. Andrews Church" in Honolulu, the sum of Two thousand Dollars (\$2000.)

13th. I give, devise and bequeath unto Kaiulani Cleghorn, daughter of A. S. Cleghorn, of Honolulu all of that parcel of land and spring situated at Waikiki-uka, Oahu, known as Kanewai; to have and to hold for and during the term of her natural life; remainder to my trustees upon the trusts named in my said will.

14th. I give and bequeath unto the Rev. Henry H. Parker, of Honolulu, the sum of Five hundred Dollars (\$500.) [64]

15th. I give and bequeath unto Mary B. Collins—

(Signed) BERNICE P. BISHOP,
Collins, if she be with me at the time of my death, the sum of Two hundred Dollars (\$200.); and unto Maggie Wynn, if she be then with me, the sum of One hundred Dollars (\$100.)

16th. I hereby give the power to all of the beneficiaries named in my said will, and in this codicil, to whom I have given a life interest in any lands, to make good and valid leases of such lands for the

term of ten years; which said leases shall hold good for the remainder of the several terms thereof after the decease of said devisees, the rent however, after such decease to be paid to my executors or trustees; provided however that no rent be collected for a longer period in advance at any time than for six months, and no bonus be taken by said devisees, or any of them, on account of such leases or lease; in either of which cases such lease or leases shall cease and determine, at the option of my executors or trustees, upon the death of such devisee or devisees, who shall have collected rent for a longer period in advance than for six months, or

(Signed) BERNICE P. BISHOP,
who shall have taken such bonus.

17th. I give unto the trustees named in my said will the most ample power to sell and dispose of any lands or other portion of my estate, and to exchange lands and otherwise dispose of the same; and to purchase land, and to take leases of land whenever they think it expedient, and generally to make such investments as they consider best; but I direct that my said trustees shall not purchase land for said schools if any lands come into their possession under my will which in their opinion may be suitable for such purpose; and I further direct that my said trustees [65] shall not sell any real estate, cattle, ranches, or other property, but to continue and manage the same, unless in their opinion a sale may be necessary for the establishment or maintenance of said schools, or for the best

interest of my estate. I further direct that neither my executors nor trustees shall have any control or disposition of any of my personal property; it being my will that my husband—

(Signed) BERNICE P. BISHOP.

husband, Charles R. Bishop, shall have absolutely all of my personal property of every description. And I give unto my executors named in my said will full power to sell any portion of my real estate for the purpose of paying debts or legacies without obtaining leave of Court; and to give good and valid deeds for the same, the purchasers under which are not to be responsible for the application of the purchase money.

In witness whereof I, said Bernice P. Bishop, have hereunto set my hand and seal this fourth day of October, A. D. Eighteen hundred and eighty-four. The words “to hold for his life, remainder to my trustees” interlined on 2d. page before signing.

(Signed) BERNICE P. BISHOP. (Seal)

Signed, sealed, published and declared by the said Bernice P. Bishop as and for a codicil to her last will and testament, in our presence, who at her request, in her presence and in the presence of each other, have subscribed our names as witnesses thereto.

Oct. 4, 1884.

(Signed) WILLIAM W. HALL.

(Signed) FRANCIS M. HATCH. [66]

[Endorsed]: 1st Codicil to the Will of Mrs. B. P. Bishop. Filed Dec. 2, 1884. (S.) Henry Smith, Dep. Clerk. [67]

Certificate of Proof of Second Codicil to Will.*Supreme Court of the Hawaiian Islands.***IN PROBATE.**

I, LAWRENCE M'CULLY, Justice of the said Supreme Court, do hereby certify:

That on the 2d day of December, A. D. 1884, the annexed instrument was admitted to probate as a Codicil to the Last Will and Testament of Bernice Pauahi Bishop, deceased; and from the proofs taken and the examinations had therein, the Court finds as follows:

That said Bernice Pauahi Bishop died on or about the 16th day of October, A. D. 1884, that at the time of her death she was a resident of Honolulu, Oahu; that the said annexed Will was duly executed by the said decedent in her life-time in Honolulu in the presence of G. Trousseau and J. Brodie, the subscribing witnesses thereto; also, that she acknowledged the execution of the same in their presence and declared the same to be a codicil to her Last Will and Testament, and the said witnesses attested the same at her request and in her presence; that the said decedent, at the time of executing said Codicil as aforesaid, was of full age, of sound and disposing mind, not under restraint, undue influence or fraudulent misrepresentations, nor in any respect incompetent to devise and bequeath her Estate.

IN WITNESS WHEREOF, I have signed this Certificate and caused the same to be attested by the

Clerk of this Court, under the seal thereof, this 2d day of December, A. D. 1884.

(Supreme Court Seal.)

(Signed) L. M'CULLY,
Justice of the Supreme Court.

Attest: (Signed) Henry Smith,
Deputy Clerk. [68]

[Endorsed]: Supreme Court in Probate. In the Matter of the Will of Bernice P. Bishop, Deceased. Certificate of Proof of Codicil. Issued the 2d day of December, A. D. 1884. (S.) Henry Smith, Dep. Clerk. [69]

**Second Codicil to Will of Bernice Pauahi Bishop,
Deceased.**

This is a second Codicil to the last Will and Testament of me, Bernice P. Bishop, dated October thirty-first, A. D. Eighteen hundred and eighty-three:

1st. In addition to the lands devised in the fourth article of my said will to H. R. H. Liliuokalani, the wife of John O. Dominis, I also give, devise and bequeath unto her, said Liliuokalani, all of that tract of land situated in the District of Honolulu, Island of Oahu, adjoining Waialae nui, known as "Kahala," together with the buildings thereon, and the fishing rights appurtenant thereto; to have and to hold for and during the term of her natural life, remainder to my trustees upon the trusts named in my said will.

2d. In addition to the house lot devised to Kapaa (k) in the seventh article of my said will, which

house lot was formerly the property of his wife Akahi, I also give, devise and bequeath unto him, said Kapaa (k) all of that parcel of land adjoining said house-lot, fronting on Queen Street, and extending to Richards Street, and now under lease to Henry R. Macfarlane; he—

(Signed) BERNICE P. BISHOP.

he, said Kapaa, to pay the taxes upon the same and upon the parcel devised by me to Auhea; to have and to hold for and during the term of the natural life of him said Kapaa, remainder to my trustees, upon the trusts named in my said will.

3d. I revoke the devise to Auhea (w) wife of Lokana, set forth in the eighth article of my said will. And I give, devise and bequeath unto said Auhea, that house-lot situated on *on* said Richards Street, (not on the corner of Queen Street), formerly occupied by said Auhea, and which was formerly the dwelling of Akahi; the same adjoining the premises under lease to Henry R. Macfarlane, but not included in said lease; to have and to hold for and during the term of the natural life of her, said Auhea, free from the control of [70] her husband; remainder to my trustees upon the trusts named in my said will.

4th. Of the two schools mentioned in the thirteenth article of my said will, I direct that the school for boys shall

(Signed) BERNICE P. BISHOP.

be well established and in efficient operation before any money is expended, or anything is undertaken

on account of the new school for girls. It is my desire that my trustees should do thorough work in regard to said schools as far as they go; and I authorize them to defer action in regard to the establishment of said school for girls, if in their opinion from the condition of my estate it may be expedient, until the life estates created by my said will have expired, and the lands so given shall have fallen into the general fund. I also direct that my said trustees shall have power to determine to what extent said schools shall be industrial, mechanical, or agricultural; and also to determine if tuition shall be charged in any case.

In witness whereof I, said Bernice P. Bishop, have hereunto set my hand and seal this ninth day of October, A. D. 1884.

(Signed) BERNICE P. BISHOP. (Seal)

Signed, sealed, published and declared by the said Bernice P. Bishop as and for a codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other have hereunto subscribed our names as witnesses [71] thereto. October 9th, 1884.

(Signed) G. TROUSSEAU.

(Signed) J. BRODIE.

[Endorsed]: 2d Codicil to the Will of Mrs. B. P. Bishop. Filed Dec. 2, 1884. (S.) Henry Smith, Dep. Clerk. [72]

**Letter, Dated June 9, 1916, Addressed to the
Justices of the Supreme Court of Hawaii by
the Trustees Requesting Appointment of New
Trustee in Place of Samuel M. Damon.**

Honolulu, T. H., June 9th, 1916.

To the Honorable A. G. M. ROBERTSON, ED-
WARD M. WATSON, and RALPH P.
QUARLES, Justices of the Supreme Court of
the Territory of Hawaii:

Sirs: The undersigned Trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased, respectfully represent to you that Samuel M. Damon, of Honolulu, one of the Trustees under the said Will and of the said Estate, has resigned his office as such Trustee, and by reason thereof there is now a vacancy in said office; that in and by the said Will it is provided that the number of Trustees thereunder and of said Estate shall be kept at five (5) and that vacancies shall be filled by the choice of a majority of the justices of the Supreme Court, the selection to be made from persons of the Protestant religion.

Wherefore, said undersigned Trustees respectfully request that your Honors appoint some person as trustee under the said Will and of the said Estate in place of and in succession to the said Samuel M. Damon, resigned as aforesaid, and suggest that William Williamson of said Honolulu, who is a person of the Protestant religion, is a suitable and proper person to be appointed such Trustee, and re-

spectfully recommend his appointment as such.

Yours respectfully,

WILLIAM O. SMITH,
E. FAXON BISHOP,
ALBERT F. JUDD, and
ALFRED W. CARTER,

Trustees under the Will and of the Estate of Bernice
Pauahi Bishop, Deceased,

By HOLMES & OLSON,

Their Attorneys. [73]

Territory of Hawaii,

City and County of Honolulu,—ss.

William Williamson, being first duly sworn, upon
oath deposes and says:

That he is a resident of the City and County of
Honolulu, Territory of Hawaii, and that he is a per-
son of the Protestant religion.

WILLIAM WILLIAMSON.

Subscribed and sworn to before me this 9th day of
June, 1916.

[Seal]

FLORENCE LEE,

Notary Public, First Judicial Circuit, Territory of
Hawaii. [74]

Appointment of Trustee.

WHEREAS, Samuel M. Damon, one of the Trus-
tees under the Will and of the Estate of Bernice
Pauahi Bishop, late of Honolulu, deceased, has re-
signed his office as such Trustee; and

WHEREAS, by reason of such resignation a va-
cancy in said office now exists; and

WHEREAS, in and by the said Will it is provided that vacancies in the offices of the Trustees under said Will and of the said Estate shall be filled by a majority of the justices of the Supreme Court, the selection to be made from persons of the Protestant religion;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That the undersigned Justices of the Supreme Court of the Territory of Hawaii, being a majority of the Justices of the said Supreme Court, by virtue and in exercise of the power for this purpose given to them in and by said Will, do hereby appoint WILLIAM WILLIAMSON of the City and County of Honolulu, Territory of Hawaii, (a person of the Protestant religion), a Trustee under the said Will and of the said Estate in place of and in succession to the said Samuel M. Damon, resigned.

IN WITNESS WHEREOF the said undersigned have hereunto set their hands and seals this 9th day of June, 1916.

(Supreme Court Seal)

(Signed) A. G. M. ROBERTSON.

(Signed) E. M. WATSON.

(Signed) RALPH P. QUARLES.

[Endorsed]: Filed June 9, 1916, at 3:20 P. M.
J. A. Thompson, Clerk. [75]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Proceedings Had June 9, 1916.

June 9th, 1916, 3:25 P. M.

(Petition read.)

Mr. OLSON.—Attached to this is Exhibit “A,” a copy of the resolution referred to. (Reads:) This is verified by Mr. Judd, one of the trustees and one of the petitioners to the proceedings.

The COURT.—Have you the original?

Mr. OLSON.—The original which—I would like to offer that in evidence, and I will ask Mr. Judd to be sworn, because he can identify the signature.

Testimony of A. F. Judd, for Petitioner.

A. F. JUDD, a witness called on behalf of the petition, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. OLSON.)

Q. Mr. Judd, your name is Albert F. Judd, is it not? A. It is.

Q. Are you one of the petitioners in the petition for the allowance of the resignation of Samuel M. Damon as trustee, filed in the matter of the Estate of Bernice P. Bishop, deceased, in the Equity Division of this court? A. I am.

Q. Who are the present trustees of the will aside from Mr. Damon? [76]

(Testimony of A. F. Judd.)

A. William O. Smith, E. Faxon Bishop, Alfred W. Carter and myself.

Q. Yes, and Mr. Damon is the fifth trustee.

A. Mr. Damon is the fifth trustee.

Mr. OLSON.—If the Court please, for many, many years the Equity Division of the Court has had before it, in the matter of accounts, as well as the matter of previous resignations, and appointments of trustees,—and I take it that therefore there will be no necessity of offering in evidence anew,—the will of Bernice P. Bishop. It is a part of the records of this court.

The COURT.—Well, I would like to look at that will and see what provision is made in regard to the appointment of a trustee. Who has the authority?

Mr. OLSON.—Mr. Smith can hand it to you. In the meantime I shall proceed to the matter.

Q. Mr. Damon is one of the present trustees under the will? A. He is.

Q. I will show to you, Mr. Judd, a document in the form of a letter, dated Belmont, California, May 19th, 1916, purporting to be signed by one S. M. Damon, and ask you if you can identify that signature?

A. I can. That is the signature of Mr. Damon.

Q. The man referred to as one of the trustees?

A. One of the trustees.

Mr. OLSON.—I will offer that in evidence, if the Court please.

The COURT.—That is Mr. Damon's signature.

(Testimony of A. F. Judd.)

The WITNESS.—It was handed to the trustees, Mr. Olson, by Mr. Holmes— [77]

Mr. OLSON.—Yes.

A. Mr. Damon's personal attorney.

The COURT.—This document will be admitted as Exhibit "A" for the petitioners.

Mr. OLSON.—Q. Mr. Damon has been absent from the Territory, has he not, on account of his health, for some time last past?

A. He has.

Q. Considerable period of time?

A. Yes, for over a year; I think it will be two years this summer, but on that exact time I am not definite.

Q. And his return to the Territory is a matter that is indefinite, is it not? A. Yes.

Q. I will ask you whether or not it is possible for Mr. Damon, being away—by the way, where is he at the present time?

A. He is in Belmont, California.

Q. California. Is it possible for Mr. Damon properly to carry out the duties, his duties, as a Trustee of the Bishop Estate in his absence, as he is now?

A. I would like to answer that question indirectly by saying that since February of 1914 we have not had the benefit of conferences with him.

Q. He has not been able to take any personal part in the administration of the estate, has he, do you think? A. No, he has not.

(Testimony of A. F. Judd.)

Q. Are you able to state what is the attitude of the remaining trustees, under the trust, to wit, yourself and Mr. W. O. Smith, E. Faxon Bishop and Alfred W. Carter, with regard to their willingness to accede to the resignation [78] of Mr. Damon?

A. We are willing to accede to it, with a great deal of personal regret.

Mr. OLSON.—Now, if the Court please, I think your Honor has before you the provision of the will which provides for the matter of the appointment. I think that is really all that it calls for so far as—

Q. Oh, I will ask you this, Mr. Judd, will the trustees be prepared to file, if so required by the Court, an account of the Estate—of the trustees, up to the time when this resignation goes into effect, if allowed by the Court?

A. That can be done at any time on 24 hours' notice. It is our practice to keep the account up in that shape so that an account can be filed at any time.

Mr. OLSON.—I think that is all. Has the Court any questions?

The COURT.—I think not, to you as a witness, but I would like to ask both of you gentlemen—this is not a matter for the records—Yes, this is for the record. I would like to ask both of you gentlemen how you construe this—why you have presented a petition addressed to me as the Judge of this Circuit Court, having charge of the equity calendar, wherein, as I remember, you asked for the appoint-

(Testimony of A. F. Judd.)

ment of a successor to Mr. Damon—

Mr. OLSON.—No, we don't ask for the appointment of a successor.

The COURT.—What do you ask for?

Mr. OLSON.—We are asking merely that his resignation be allowed, because a resignation is not a voluntary matter [79] on the part of the trustees. The only time he voluntarily can renounce is at the beginning, when the trust is offered to him; he can then renounce or refuse to take it, but, once having assumed, he cannot voluntarily, on his own account, renounce the office and disclothe himself of the cloth of his office. It requires the approval and allowance of the Court having jurisdiction; in this case, of course, the equity court, the Judge having jurisdiction over equity matters, and in order that Mr. Damon's resignation can go into effect, and to make it possible for the final consummation of the matter of the appointment of his successor, his resignation would have to be allowed. I might say further that not only must the approval and allowance of the Court be obtained to effectuate the resignation but to effectuate his discharge from his responsibility for the acts of the trustees during the time that he has acted as trustee. The Court will necessarily require that the accounting be filed by the trustees up to the time when his resignation goes into effect by virtue of the order of the Court and his discharge from financial responsibility will only be effected when those accounts have been approved.

(Testimony of A. F. Judd.)

Argument.

The COURT.—Well, what order do you feel should be made by me at the present time?

Mr. OLSON.—My suggestion and request is, if the Court please, that the resignation of Mr. Damon be allowed—be approved, allowed and accepted, to take effect upon the appointment of his successor. Further, that the order be that the trustees of the Estate, including Mr. Damon, [80] file forthwith, upon the appointment of his successor, their accounts up to the date of the appointment of his successor, and that upon the approval and only upon the approval of those accounts Mr. Damon be discharged from his responsibility as a trustee and his bond cancelled and his sureties thereon discharged.

[81]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

June 9th, 1916, 3:30 P. M.

Mr. OLSON.—I now wish, if the Court please, to present to your Honor, in the same matter, in the Matter of the Estate of Bernice Pauahi Bishop, in the Equity Division of this court, another and separate petition addressed to your Honor. (Reads.)

A. F. JUDD, a witness called on behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. OLSON.)

Q. Mr. Judd, your name is Albert F. Judd?

(Testimony of A. F. Judd.)

A. It is.

Q. You are one of the signing petitioners to the petition for the confirmation of appointment of Mr. Williamson as one of the new trustees of the Bishop Estate, are you not? A. I am.

Q. Who are the other trustees aside from yourself and aside from Mr. Damon, who has resigned?

A. William O. Smith, E. Faxon Bishop, Alfred W. Carter.

Q. You being the fourth, and Mr. Damon having been, up [82] to this time, the fifth, up to his resignation?

Mr. OLSON.—Your Honor will take notice, I take it, of the fact that the resignation of Mr. Damon has been filed and allowed by your Honor.

Q. I will ask you, Mr. Judd, if the Supreme Justices of the Supreme Court of the Territory of Hawaii, to wit, the Honorable A. G. M. Robertson, Chief Justice, the Honorable E. M. Watson, Associate Justice, and Honorable Ralph P. Quarles, Associate Justice of the Territory of Hawaii, have named any person as the successor to Mr. Damon?

A. I have seen a document in which the three gentlemen named have signed to that effect.

Q. Nominating whom?

A. William Williamson.

Q. Mr. Williamson resides where?

A. In this city.

Q. I will ask you if you are acquainted with Mr. Williamson personally? A. I am.

Q. How long have you been acquainted with him?

(Testimony of A. F. Judd.)

A. I think since 1899.

Q. What was his occupation or profession when he first—when you first knew him?

A. I don't remember the dates, Mr. Olson. Mr. Williamson graduated from Williams College in 1895, and, whether immediately following his graduation or later, I am not now certain, he came to Oahu College, in this city, and there taught for at least two years. He taught some of my younger brothers and sisters.

Q. And after he continued as a teacher of Oahu College [83] for the period of time that you have mentioned what became his business?

A. I think it was then—he then went into the firm of Von Hamm Young & Company.

Q. In what capacity?

A. There again I cannot state with accuracy. I believe that he was a traveling salesman for some time. Whatever his connection was, his business took him to travels throughout the group.

Q. And after he terminated his connection with Von Hamm Young Company what became his business?

A. To the best of my knowledge he then went into the stock and bond business, in which he is now employed.

Q. How many years, approximately, would you say that he has been in the stock and bond business?

A. It may be five, it may be ten years; I don't know.

Q. What have you to say about the business ex-

(Testimony of A. F. Judd.)

perience and ability of Mr. Williamson?

A. He has the reputation of being a conservative business man.

Q. In your opinion would he be a suitable person to act as trustee, from a business standpoint, of the Bishop Estate? A. He would.

Q. What have you to say about Mr. Williamson from the standpoint of acting as trustee, in view of the fact that the principal purpose of the trust is the conduct of a school for boys, and a school for girls, for the benefit of children and youths of Hawaii who are principally of the Hawaiian blood?

A. At the present time I know of no other person better [84] qualified than he to take the position on the Board of Trustees.

Mr. OLSON.—I think that's all, Mr. Judd.

The COURT.—No questions.

Testimony of J. A. Thompson, for Petitioner.

Direct examination of J. A. THOMPSON, a witness called on behalf of the petitioner and first duly sworn, testified as follows:

(By Mr OLSON.)

Q. Mr. Thompson, will you sit down, please? Your name is what? A. J. A. Thompson.

Q. What is your occupation?

A. Clerk of the Supreme Court of Hawaii.

Q. I will ask you if you have brought with you pursuant to my request, a document which has been filed with you by the Justices of the Supreme Court, pertaining to the matter of the appointment of a

(Testimony of J. A. Thompson.)

trustee of the Bernice Pauahi Bishop Estate?

A. This is it.

Q. You have it with you? A. Yes, sir.

Q. I will call your attention to the third page, the first two pages consisting of, first, a communication addressed to the Justices of the Supreme Court, the second the affidavit of one William Williamson, regarding his residence and religion, and the third page, which I am now directing your attention to, being a document called appointment of trustees, and purporting to be signed by one A. G. M. Robertson, one E. M. Watson and one Ralph P. Quarles, and I will ask [85] you if you recognize those signatures and can identify them?

A. Yes, sir; they are the signatures of the persons named therein.

Q. Mr. A. G. M. Robertson is what?

A. Chief Justice.

Q. Chief Justice of the Territory of Hawaii?

A. Chief Justice of the Territory of Hawaii.

Q. Mr. E. M. Watson is Associate Justice of the Supreme Court and also Ralph P. Quarles, also an Associate Justice—

The COURT.—I think this Court may very well take judicial notice of the personnel of that court.

Mr. OLSON.—I think so.

Q. And this document altogether, consisting of these three pages, was filed with you by the Justices named?

A. Yes, sir, handed to me by the Chief Justice, ordered filed.

Mr. OLSON.—I will offer that in evidence and ask permission to file a certified copy thereof, and withdraw the original, to be kept in the files of the Supreme Court.

The COURT.—Anything further from this witness?

Mr. OLSON.—That's all.

The COURT.—No questions.

Mr. OLSON.—Upon the showing made we ask that the prayer of the petition be granted, to wit, that the appointment of William Williamson, as trustee under the will of the Estate of Bernice Pauahi Bishop, deceased, be approved and confirmed upon the filing of such a bond as your Honor may require; and in that regard I will state that it has been the practice for many years last past to require of [86] each trustee at least a bond in the sum of one hundred thousand dollars, and that the Court has in all instances, for many years last past, approved that bond given by all of the five trustees, in which each one is a principal and in which each one is a surety for every one of the other trustees. I might state that the trustees in this instance and Mr. Williamson are willing to give such a bond. Before I close I would like to ask Mr. Judd one question.

Q. (Put to Mr. Judd on the floor of the courtroom.) Is Mr. Williamson willing to undertake this office of trustee? A. He is.

I HEREBY CERTIFY the above and foregoing to be a complete and accurate extension of my short-

hand notes of the testimony taken in the above-entitled matter on the 9th day of June, A. D. 1916, before the Honorable C. W. Ashford, First Judge.

JAMES L. HORNER,
Official Reporter.

[Endorsed]: Eq. No. 2048. Reg. 2, pg. 297. Re Estate Bernice Pauahi Bishop, Deceased. Transcript of Testimony. No. 416. Filed at 11:20 o'clock A. M. September 23d, 1916. J. A. Dominis, Clerk. No. 972. Recd. and filed in the Supreme Court Sept. 25, 1916, at 12 o'clock. N. Robert Parker, Jr., Assistant Clerk. [87]

In the Supreme Court of the Territory of Hawaii.

APPEAL FROM THE CIRCUIT COURT OF
THE FIRST CIRCUIT.

No. 972.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

**Suggestion of Disqualification of the Justices of the
Supreme Court.**

Comes now Charles E. King, the appellee, herein, and respectfully suggests that this court as present constituted is disqualified from hearing this appeal upon the ground that two of the members thereof, to wit: Chief Justice A. G. M. Robertson and Associate Justice R. P. Quarles have a pecuniary interest, direct or indirect in this cause.

Amendment
allowed by
the Court
Jan'y 17,
1917. J. A.
Thompson,
Clerk.

This suggestion is based upon the record and the

attempted and pretended appointment by the justices of this court of William Williamson, as Trustee under the will and of the estate of Bernice Pauahi Bishop, Deceased, in place of and in succession to S. M. Damon, resigned.

Dated, Honolulu, T. H., December 1st, 1916.

E. C. PETERS,

By P. D. K., Jr.,

Attorney for Charles E. King.

E. C. PETERS,

Attorney and Counsellor at Law,

210-211 McCandless Bld.,

Honolulu, T. H. [88]

City and County of Honolulu,

Territory of Hawaii,—ss.

I hereby certify that on, to wit, Dec. 2, 1916, and during the ordinary business hours of said day, I left a true, full and correct copy of the foregoing Suggestion of Disqualification at the offices of Messrs. Holmes & Olson, with a person of mature age and discretion in charge of said offices.

P. D. KELLETT, Jr.

[Endorsed]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Suggestion of Disqualification. Recd. and filed in the Supreme Court, Dec. 2, 1916, at 9:40 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [89]

In the Supreme Court of the Territory of Hawaii.
October Term, 1916.

No. 972.

APPEAL FROM CIRCUIT JUDGE, FIRST
CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Opinion of Supreme Court of Hawaii.

HON. C. W. ASHFORD, Judge.

Argued January 24, 1917.

Decided February 1, 1917.

ROBERTSON, C. J., QUARLES AND COKE, JJ.

Judges—Disqualification—Pecuniary Benefit.

Where a majority of the justices of the supreme court acting under a power of appointment contained in a will, the justices receiving no reward or pecuniary benefit, fill a vacancy among the trustees under such will, they are not thereby disqualified from sitting in a case on appeal involving the validity of the appointment.

Wills—Construction—Appointment of Trustees.

The will of B named five trustees to execute a certain trust therein created, provided that the number of trustees should be kept at five, and provided that vacancies among the trustees should be “filled by the choice of a majority of the justices of the supreme court;” at the time the will took effect the justices, severally,

exercised original jurisdiction in equity subject to appeal to the Supreme Court in banco; later all original jurisdiction in equity was transferred to circuit judges sitting at chambers in equity. Held, in construing the will, that it was the intention of the testatrix to vest the power of filling vacancies in the justices, as individuals, and not in the court which should exercise original jurisdiction in matters of the trust, and, consequently, [90] that the transfer of sole original jurisdiction to circuit judges at chambers in equity did not transfer from the justices of the supreme court to the circuit judge the power of filling vacancies among the trustees under the will.

Same—Same—Words and Phrases.

Where an instrument creating a trust named trustees, fixed the number of trustees and provided that vacancies among the trustees “should be filled by the choice of the majority of the justices of the Supreme Court,” the word “choice” therein is synonymous with and means “appoint,” and an appointment so made is not subject to confirmation or rejection by the circuit judge exercising original jurisdiction in matters relating to the trust.

Trusts—Appointment of Trustee—Judicial Function.

While a grantor of a trust cannot delegate a judicial function to any court, such function being created by law, the naked power of appointing

in succession the trustees of a trust is not a judicial function but a power which may be delegated by the grantor. [91]

OPINION OF THE COURT BY QUARLES, J.

In the will of Bernice P. Bishop, after making a number of devises and bequests, the testatrix devised the residue of her estate to five trustees therein appointed, to be held and used by them in the erection and maintenance in the Hawaiian Islands of two schools, one for boys and one for girls, to be called the Kamehameha Schools, a portion of the income for each year to be devoted to the support and education of orphans and others in indigent circumstances, giving the preference to Hawaiian of pure and part aboriginal blood. The estate is very large and of great value. Considerable discretion is left to the trustees in the execution of the trust and the furtherance of its objects. The testatrix named as such trustees, her husband, Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke and William O. Smith, and under the paragraph naming them (14) are found the following provisions: "I direct that a majority of my said trustees may act in all cases, and may convey real estate, and perform all of the duties and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the trustees of the Supreme Court, the selection to be made from persons of the protestant

religion." This will was executed in 1883, the year before the testatrix died, and the will was admitted to probate December 2, 1884. Vacancies have occurred from time to time and have been filled so that on the 9th day of June, 1916, of the five trustees, namely, Samuel M. Damon, William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, only the first two mentioned were appointed by the testatrix. On June 9, 1916, the written resignation of Samuel M. Damon as such trustee was presented to the first judge of the first Judicial Circuit, who at chambers exercises [92] original jurisdiction in equity, and has original jurisdiction of the trust created by said will, and on the petition of all of said trustees was by order then made accepted, thereby leaving a vacancy caused by the said resignation of said Samuel M. Damon. On the same day the said vacancy was brought to the attention of the justices of this court by presenting said resignation, and all of the justices, exercising the power delegated to them in the said will, appointed William Williamson to succeed the said Samuel M. Damon as trustee under the provisions of said will. Thereupon and on the same day the trustees Smith, Bishop, Judd and Carter presented the said Circuit Judge their petition setting forth the qualifications of said Williamson as such trustee and his said appointment by the justices of this court and prayed that his appointment as aforesaid be confirmed by said Circuit Judge. A hearing on the said petition was immediately had when certain evidence touching the qualifications

and fitness of the said William Williamson as such trustee was introduced before the said Circuit Judge. Thereafter, and on the 29th day of July, 1916, the said Circuit Judge in a document styled "Opinion and Decision" decided that the appointment of the said Williamson as aforesaid was without authority, null and void; made an order assuming to appoint Charles E. King as trustee to fill the said vacancy, and fixed his bond at \$20,000 if given separately, but providing, however, that a new joint bond on behalf of all of the trustees, including the said King, might be given in the sum of \$100,000. Thereafter, and on August 3, 1916, a decree was filed, signed by the said Circuit Judge, adjudging the appointment of William Williamson as such trustee by the justices of this court to be null and void; appointing the said Charles E. King as a trustee under the said will in succession to Samuel M. Damon resigned, and providing for the execution in the [93] alternative of one of the bonds before mentioned. From the said decree of the Circuit Judge the trustees have appealed to this court.

A written suggestion of the disqualifications of the justices of this court who made the said appointment of William Williamson as such trustee was filed in this court on the 2d day of December, 1916, wherein it is suggested that the said justices "have a pecuniary interest, direct or indirect, in this cause." The power of appointment delegated to a majority of the justices of this court in and by the said provision of the will aforesaid is a naked power without reward or pecuniary benefit to the

justices or any of them. For this reason the suggestion as to the disqualification of the justices appointing the said William Williamson to fill the said vacancy was denied; and it was held, and is held, that the said justices are not disqualified from presiding at the hearing and determination of this appeal.

The ground upon which the learned Circuit Judge based his decision that the appointment of William Williamson by the justices of this court was without authority and void is that at the time of the death of the testatrix and prior thereto the Supreme Court of Hawaii and the justices thereof exercised original jurisdiction in equity, and by the rules of law and equity the court and the justices thereof were vested with the power to fill vacancies in the matter of trustees generally; that it was the intent of the testatrix to vest such power in the court and not in the individuals who might from time to time "chance to fill the offices of a majority of the justices of the Supreme Court," and this view has been ably and learnedly insisted upon by counsel for Charles E. King. The fitness of the trustee appointed is not a matter for the Circuit Judge to determine, but the power and responsibility of so doing are vested by the testatrix in the justices [94] of this court, a majority of whom must exercise such duty. It is not contended that the testatrix did not have the power of appointing the original trustees, or that she did not have the power, for the purpose of perpetuating the trust and carrying out the objects and purposes thereof, of pro-

viding in her will the mode and manner of filling vacancies among the trustees under the will, or that she did not have the power of prescribing what individuals, body or tribunal should exercise such power, the contention being that she intended that the judicial tribunal exercising control over the matters of the trust should exercise the power of filling vacancies, and that when, by the judiciary act of 1892, exclusive original jurisdiction in equity was vested in circuit judges sitting at chambers, the said power passed from the Supreme Court and justices thereof to the Circuit Judges and can only be exercised, under a proper construction of paragraph 14 of said will, by the Circuit Judge who, presiding at chambers in equity, has jurisdiction in equity. To support this contention cases in which it is claimed that the justices of the Supreme Court sitting in banco exercised original jurisdiction are cited as follows; *Tucker v. Est, of Metcalf*, 3 Haw. 180; *Davis v. Brewer*, 3 Haw. 359; *Wei See v. Young Sheong*, 3 Haw. 489; *In the Matter of the Estate of His Late Majesty Lunalilo*, 3 Haw. 519; *Unauna v. Armstrong*, 3 Haw. 705; *Kalakaua v. Keaweamahi*, 4 Haw. 577, and *Kalaeokekoi v. Kahele*, 4 Haw. 668.

In *Tucker v. Est. of Metcalf*, Chief Justice Allen, as chancellor, and Hartwell, Justice, sat in an equity case and made an order referring the cause to a master to state an account in the matter of the dissolution of a partnership "with the agreement that Hartwell, J., should sit with the chancellor, and their decision be final." In *Davis v. Brewer*, *Wei See v. Young Sheong* (see concurring opinion of Hartwell,

J.), In the Matter of the Estate of His Late Majesty Lunalilo, Unauna v. Armstrong, and [95] Kalaeokeoi v. Kahele, the hearings in the Supreme Court were upon appeal as a careful inspection of the decisions will show, except in the case last mentioned, but the record in this court shows that in that case a demurrer was heard by Judd, C. J., as chancellor, and sustained by him March 23, 1883, an appeal being taken from his decision on March 24, 1883. The decision under this appeal, which is reported in 4 Haw. 668, was filed April 11, 1883. By constitutional and statutory provisions prior to the judiciary act of 1892 original jurisdiction in equity was vested in the Supreme Court and Circuit Courts. Such jurisdiction was exercised by the chief justice as chancellor, the first associate justice as vice-chancellor, and, subsequent to 1862, by the second associate justice, acting severally and not jointly, and from the decision of the chancellor, vice-chancellor or second associate justice an appeal lay to the Supreme Court *in banco* (Constitution 1852, Art. 86; Constitution 1864, Art. 68; Compiled Laws 1884, Secs. 847, 848). After the act of 1878 (see Compiled Laws 1884, p. 389), and prior to the judiciary act of 1892, the several justices of the Supreme Court sitting at chambers, and the several Circuit Judges, exercised original equity jurisdiction. A careful examination of the decisions shows that it was the rule by constitution, statute and practice for a single justice to sit in equity matters, his decision being subject to appeal to the Supreme Court *in banco*. To this rule, custom or practice there appears to

have been only two exceptions, those in the cases of *Tucker v. Est. of Metcalf*, and *Kalakaua v. Keawe-amahi*, where, by agreement, the first named cause was submitted to the chancellor and Hartwell, Jr., and in the latter cause a demurrer was heard in the first instance by the full court, by consent, for the purpose of expediting the decree in the cause and making the decision on the demurrer final, analogous to reserving a question. The very fact that in these two last cases named the submission to more than one [96] justice was by consent tends to show the departure made in these cases from the usual practice in equity matters wherein original jurisdiction in equity was exercised by a single justice sitting in equity at chambers. This practice obtained at the time the will of the testatrix was written, had obtained for many years prior thereto, and was in force at the time the will was probated and took effect; hence the provision of the will under consideration must be construed as being intended to vest and as vesting in the justices of this court as individuals, and not as a court, the power of filling vacancies among the trustees. If the authority to fill such vacancies had been delegated to the police magistrate of Honolulu it would be evident that it was not in the mind of the testatrix that the particular Judge or court exercising equity jurisdiction in other matters touching the trust should also have power to fill vacancies in the office of trustee under the will. Inasmuch as the justices of the Supreme Court at the time the will became effective did not act jointly

or as a court *in banco* in exercising original jurisdiction, but acted severally, it would be extending the terms of the provision of the will under consideration to hold that the testatrix intended by the language used that when a trustee under the will dies or resigns the vacancy thereby occasioned should be filled by appointment made by the particular court exercising original equity jurisdiction in other matters pertaining to the trust. It is true that the testatrix in the will could not delegate a judicial function to any court; that such functions are created by law and not by appointment of individuals. But the naked power of appointing in succession the trustees of the trust is not of itself a judicial function but a power which may be created by the grantor of a trust. If the testatrix had named the chancellor as the person to fill vacancies it might well be contended that she intended [97] that the Court exercising original equity jurisdiction should fill vacancies among the trustees under her will, and, consequently, that when the Chief Justice ceased to be chancellor and the powers of the chancellor were transferred to the Circuit Judge sitting at chambers in equity, that it was her intention that the latter should thereafter exercise such power of appointment. We think the conclusion is reasonable that the testatrix in naming a majority of the justices of this court intended that the individuals occupying the offices of chief justice and associate justices, or a majority of them, acting as individuals, should exercise the power of appointment, and not the Supreme Court, and that the language used is merely descrip-

tive of the persons whom she intended should exercise the power. This conclusion is the more reasonable one when we reflect that the testatrix must have known of the changes which occur from time to time in the personnel of the justices of this court.

Construing the provision in the will of the testatrix touching the filling of vacancies among the trustees under the will as we do make it unnecessary to review the many authorities to which we have been cited to the effect that when the judge of a certain court charged with the sole exercise of original jurisdiction of a particular subject, for instance, equity or probate, is vested with the power of filling vacancies among the trustees of a trust by the instrument creating the trust, that the grantor intended to vest the *court* with such power and not the *judge as an individual* who presides over such court, such authorities not being in point here. The delay and confusion that have arisen in the matter before us are largely due to the improper action of the trustees under the will of the testatrix in petitioning the first Circuit Judge, sitting at chambers in equity, to confirm the appointment of William Williamson as trustee. The will does not provide that the choice or appointment made by the justices [98] of this court should be subject to the approval or consent of any other officer or tribunal. The power of approval implies the power or right of disapproval—the power of vetoing the act of the justices of this court in exercising the power of appointment—and such veto power, if exercised as attempted by the learned

Circuit Judge, would necessarily result in defeating the intent of the testatrix as expressed in the provisions of her will under consideration. The only proper petition to the Circuit Judge would be one asking that he name the amount of the bond to be given by the appointee and approve the same when given.

The learned Circuit Judge took the view that the word "choice" in the provision of the will of the testatrix under consideration is synonymous with and means "nominate," and does not mean "appoint," and he therefore concludes that the power of approving or rejecting a "nomination" made by the justice or a majority of the Justices of this court rests with him. With this view counsel for Charles E. King does not concur, as in the argument on the appeal he expressed the view that the word "choice" is synonymous with and means "appoint," and with such view we fully agree.

The decree appealed from is reversed and the cause is remanded to the Circuit Judge sitting at chambers in equity with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to Samuel M. Damon resigned, and for such further proceedings as are consistent with the views herein expressed.

P. R. BARTLETT (HOLMES & OLSON, with him on the brief), for the Trustees.

E. C. PETERS, for Charles E. King.

A. G. M. ROBERTSON.

RALPH P. QUARLES.

JAMES L. COKE.

[Endorsed]: No. 972. Supreme Court, Territory of Hawaii. October Term, 1916. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Opinion. Filed February 1, 1917, at 3:15 o'clock P. M. J. A. Thompson, Clerk. [99]

In the Supreme Court of the Territory of Hawaii.
APPEAL FROM CIRCUIT JUDGE, FIRST
CIRCUIT.—No. 972.

In the Matter of the Estate of BERNICE P.
BISHOP, Deceased.

Decision on Appeal.

In the above-entitled cause, pursuant to the opinion of the above-entitled court filed on the first day of February, 1917, the decree appealed from is reversed, and the cause is remanded to the Circuit Judge sitting at Chambers in Equity, with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to S. M. Damon, resigned, and for such further proceedings as are consistent with the views in said opinion expressed.

Dated Honolulu, T. H., this 13th day of February, 1917.

By the Court:

J. A. THOMPSON,

Clerk, Supreme Court, Territory of Hawaii.

[Endorsed]: No. 972. Supreme Court, Territory of Hawaii. October Term 1916. In the Matter of the Estate of Bernice P. Bishop, Deceased. Deci-

sion on Appeal. Filed February 13, 1917, at 1:45 P. M. J. A. Thompson, Clerk. [100]

In the Supreme Court of the Territory of Hawaii.

APPEAL FROM CIRCUIT JUDGE, FIRST
CIRCUIT.

#972.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Motion for Entry of Decree.

Comes now Chas. E. King, the appellee in the above-entitled motion, and respectfully moves that a Decree on Appeal be entered and filed herein, and respectfully tenders herewith a form of decree on appeal for that purpose.

This motion was based upon the record of proceedings had herein and the form of decree submitted herewith.

Dated at Honolulu, T. H., this 14th day of April, A. D. 1917.

E. C. PETERS,
Attorney for Chas. E. King. [101]

In the Supreme Court of the Territory of Hawaii.

APPEAL FROM CIRCUIT JUDGE, FIRST
CIRCUIT.

#972.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Decree on Appeal.

This cause coming on for hearing in this court, and the Court having considered the same and heard the argument of the respective counsel, and having heretofore, to wit, on February 1st, 1917, rendered a written opinion herein, and a decision upon the same having been filed in accordance therewith, on, to wit, February 13th, 1917,—

IT IS ORDERED, ADJUDGED AND DECREED: That pursuant to said written opinion and said decision, the decree and judgment of the Circuit Judge appealed from, is reversed, and the cause is remanded to said Circuit Judge aforesaid, sitting at Chambers in Equity, with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to S. M. Damon, resigned, as Trustee under the will of Bernice P. Bishop, and for such further proceedings as are consistent with the views expressed in said opinion and decree aforesaid.

Dated, Honolulu, T. H., April —, 1917.

By the Court:

_____,
Clerk, Supreme Court, Territory of Hawaii.

Approved:

_____,
Chief Justice. [102]

City and County of Honolulu,
Territory of Hawaii,—ss.

I hereby certify that on, to wit, —, I did deposit a full, true and correct copy of the foregoing

———— in the United States Post Office at Honolulu, City and County of Honolulu, Territory of Hawaii, inclosed in an envelope duly postpaid and addressed to ————— at Honolulu aforesaid, in time to reach such address in due course of mail, to wit:

YONG SEN.

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Motion for Entry of Decree on Appeal. Filed April 16, 1917, at 9:40 A. M. J. A. Thompson, Clerk.

[103]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

CLERK'S MINUTES.

Vol. 5. Monday, April 16, 1917.

Page 265.

Court convened at 10:00 o'clock A. M.

Present on the Bench,

Hon. A. G. M. ROBERTSON, C. J., Hon. R. P.

QUARLES and Hon. J. L. COKE, JJ.

APPEAL FROM CIRCUIT JUDGE, FIRST
CIRCUIT.

S. C. No. 972.

From Page 207.

In the Matter of the Estate of BERNICE PAUAAHI
BISHOP, Deceased.

**Minutes of Court—April 16, 1917—Hearing Upon
Motion of Charles E. King for Entry of Decree.**

Appearances:

E. C. PETERS, and F. SCHNACK, for the
Motion.

C. H. OLSON, of the Firm of HOLMES &
OLSON, and P. R. BARTLETT, Contra.

When the above-entitled cause was called, Mr. Schnack stated to the Court that a motion for the entry of a decree in said cause has been filed, and thereupon Mr. Olson objected to the entry of the decree at this time.

At the request of the Court, Mr. Schnack proceeded to read the motion for the entry of the decree; he also read a form of a decree tendered with said motion.

The Court rendered its ruling denying the motion, on the ground that the case has already been remanded to the lower court upon the decision heretofore filed following the practice of the [104] Court wherein notice is given the lower court. [105]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT, FIRST
CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Petition on Appeal.

The petitioner herein, Charles E. King, deeming himself aggrieved by the decree entered February 13th, 1917, in the Supreme Court of the Territory of Hawaii, in the above-entitled matter and proceeding, does hereby appeal from the same to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that this appeal to the said United States Circuit Court of Appeals for the Ninth Circuit may be allowed in accordance with the laws of the United States in that behalf made and provided, and for the reasons specified in the assignment of errors herein; and that a transcript of the record, proceedings and documentary exhibits upon which said decree was made, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit; and, also, that an order may be made by this Honorable Court fixing the amount of the bond which the said Charles E. King shall give and furnish upon said appeal, and that upon the filing of such bond all proceedings in said above-entitled cause in the Supreme Court of the Territory of Hawaii and in the Circuit Court of the First Judicial Circuit of said Territory, be suspended and stayed, until the determination of this appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf, your petitioner Charles E. King, [106] shows that said decree was rendered in equity and that the amount involved, exclusive of

costs, exceeds the sum of \$5,000.00.

Dated this 27th day of April, A. D. 1917.

CHARLES E. KING,
Petitioner.

E. C. PETERS,
By F. SCHNACK,
Attorney for Petitioner.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Charles E. King, being first duly sworn, on oath deposes and says:

That he is the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof, and that the matters and things therein set forth are true of his own knowledge; and, further, that the amount involved in said cause, exclusive of costs, exceeds the sum of \$5,000.00.

CHARLES E. KING.

Subscribed and sworn to before me this 27th day of April, A. D. 1917.

[Notarial Seal] F. SCHNACK,
Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Petition on Appeal. Filed April 27, 1917, at 3:05 P. M. J. A. Thompson, Clerk. E. C. Peters, Esq., Attorney for Appellant. [107]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT, FIRST
CIRCUIT.

In the Matter of the Estate of BERNICE P.
BISHOP, Deceased.

Assignment of Errors.

Comes now Charles E. King, appellant herein, and says that in the record, opinion and decision, decree and proceedings in the above-entitled matter, in the above-entitled court, there is manifest and material error, and appellant herein now makes, files and presents the following assignment of errors upon which he relies, as follows, to wit:

I.

That the Court erred in holding and deciding that, as constituted, it was not disqualified from sitting upon the appeal herein.

II.

That the Court erred in not holding and deciding that the Honorable the Associate Justice RALPH P. QUARRELS, and the Honorable the Chief Justice A. G. M. ROBERTSON, were, and each of them was, pecuniarily interested in the issue of this case, and under the provisions of Section 84 of the Organic Act were, and each of them was, disqualified from sitting as members of the Supreme Court upon appeal herein.

III.

That the Court erred in holding and deciding that

under the fourteenth article of the will of Bernice Pauahi Bishop, deceased, the power of filling vacancies among the trustees under [108] the will and of the estate of said decedent was reposed in a majority of the justices of the Supreme Court acting as individuals.

IV.

That the Court erred in not holding and deciding that under the fourteenth article of the will of Bernice Pauahi Bishop, deceased, as the law at the time of the death of the testatrix then existed, the power of filling vacancies among the trustees under the will of the estate of said decedent was reposed in the Supreme Court.

V.

That the Court erred in not holding and deciding that under the fourteenth article of the will of Bernice Pauahi Bishop, deceased, as the law at the time of the death of the testatrix then existed, the power of filling vacancies among the trustees under the will and of the estate of said decedent was reposed in the Supreme Court of the Territory of Hawaii, and that on passage of the Judiciary Act of 1892 (Chapter 57, S. L. 1892), as amended, this power was reposed in the Circuit Courts at Chambers, and at the time of filling the vacancy caused by the resignation of one of the trustees, S. M. Damon, Esq., reposed in the Circuit Court of the First Circuit at Chambers.

VI.

That the Court erred in not holding and deciding that at best, in the absence of an absolute delegation

of the power of appointment upon the Court as such, a majority of the Justices of the Supreme Court had merely the power of nomination, and that the power of appointment under the fourteenth article of the will of Bernice Pauahi Bishop, deceased to the office of trustee under the will and of the estate of said decedent, was [109] at the time of the filling of the vacancy herein in succession to S. M. Damon, Esq., resigned, vested in the Circuit Court of the First Circuit at Chambers.

VII.

That the Court erred in holding and deciding that the decree of the Circuit Judge appealed from, be reversed, and the cause remanded to said Circuit Judge sitting at Chambers in Equity, with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to S. M. Damon, Esq., resigned, as trustee under the will of Bernice P. Bishop, deceased, and for such further proceedings as were consistent with the views expressed in the opinion and decree of said Court.

VIII.

That the Court erred in entering its decree herein dated February 13th, 1917, ordering, adjudging and decreeing that the decree of the Circuit Judge appealed from be reversed, and the cause remanded to said Circuit Judge sitting at Chambers in Equity, with instructions to dismiss the petition asking for the approval of the appointment of William Williamson in succession to S. M. Damon, Esq., resigned,

as trustee under the will of Bernice P. Bishop, deceased, and for such further proceedings as were consistent with the views expressed in the opinion of said Court.

IX.

That the Court erred in not affirming the decree of the Circuit Judge appealed from.

WHEREFORE, and in order that the foregoing Assignment of Errors may be and appear of record, the said appellant herein [110] files and presents the same to the said court and prays that such disposition may be made thereof as may be in accordance with law. And said appellant herein prays a reversal of the above-mentioned decree heretofore made and entered by said Court and appealed from.

CHARLES E. KING, Appellant.

By E. C. PETERS,

By F. SCHNACK,

His Attorney.

Service of the foregoing Assignment of Errors is hereby admitted this 27th day of April, A. D. 1917.

HOLMES & OLSON,

Attorneys for A. F. Judd, E. Faxon Bishop, W. O. Smith, and Alfred W. Carter, Trustees Under the Will and of the Estate of Bernice P. Bishop, Deceased. [111]

[Endorsed]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Assignment of Errors. Filed April 27, 1917, at 3:05 P. M. J. A. Thompson, Clerk. [112]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT,
FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Supersedeas and Cost Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, Charles E. King, of Honolulu, City and
County of Honolulu, Territory of Hawaii, as prin-
cipal, and Edmund Stiles, of the same place, as
surety, are held and firmly bound unto William O.
Smith, E. Faxon Bishop, Albert F. Judd and Al-
fred W. Carter, as trustees under the will and of
the estate of Bernice Pauahi Bishop, deceased, in
the full and just sum of FIVE HUNDRED
(\$500.00) DOLLARS, for the payment of which,
well and truly to be made, we do hereby bind our-
selves, our and each of our respective heirs, execu-
tors and administrators, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS
AS FOLLOWS:

WHEREAS, in the above-entitled cause and
court, an appeal from the decree heretofore therein
rendered has been taken and allowed to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, and a supersedeas issued therein:

NOW, THEREFORE, shall the above bounden
principal prosecute his said appeal to effect and
conclusion, and answer all damages and costs if he

fails to make good his plea, then the above obligation shall be null and void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the above named principal and surety [113] have hereunto set their hands and seals, this 27th day of April, A. D. 1917.

CHARLES E. KING, (Seal)

Principal.

EDMUND STILES, (Seal)

Surety.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Edmund Styles, being first duly sworn, on oath deposes and says: That he is a resident of Honolulu, City and County of Honolulu, Territory of Hawaii, and is worth double the amount of the penalty in the foregoing bond in property located in said Honolulu aforesaid, not exempt from execution, over and above all debts and liabilities.

EDMUND STILES.

Subscribed and sworn to before me this 27th day of April, A. D. 1917.

[Notarial Seal]

F. SCHNACK,

Notary Public, First Judicial Circuit, Territory of Hawaii.

Approved as to form and sufficiency of surety.

[Supreme Court Seal]

A. G. M. ROBERTSON,

Chief Justice, Supreme Court of the Territory of Hawaii. [114]

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Supersedeas and Cost Bond on Appeal. Filed April 27, 1917, at 3:05 P. M. J. A. Thompson, Clerk. E. C. Peters, Esq. Attorney for Appellant.
[115]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT,
FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

**Order Allowing Appeal and Fixing Amount of
Bond.**

Upon reading and filing the petition and assignment of errors presented to this court by Charles E. King, in which he prays that an appeal may be allowed him to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree of this court entered on the 13th day of February, 1917, in the above-entitled matter and proceeding, wherein it is alleged manifest error hath occurred; and in order that said error, if any there be, may be speedily corrected and justice done in the premises:

IT IS ORDERED that the said appeal to the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, hereby allowed,

and said petitioner is ordered to file with the clerk of this court, an approval bond in the sum of \$500, conditioned that he will prosecute said appeal to conclusion, and effect and answer all damages and costs if he fails to make good his said plea and appeal.

AND IT IS FURTHER ORDERED that upon the filing of such bond, all further proceedings in the above-entitled cause, in this court and in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, shall be suspended and stayed until [116] the determination and conclusion of the said appeal aforesaid in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 27th day of April, A. D. 1917.

[Seal]

A. G. M. ROBERTSON,
Chief Justice, Supreme Court of the Territory of
Hawaii. [117]

[Endorsed]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Order Allowing Appeal and Fixing Amount of Bond. Filed April 27, 1917, at 3:05 P. M. J. A. Thompson, Clerk. [118]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT COURT,
FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAAHI
BISHOP, Deceased.

Citation.

The United States of America,—ss.

The President of the United States of America:

To William O. Smith, E. Faxon Bishop, Albert
F. Judd and Alfred W. Carter, as Trustees Under
the Will and of the Estate of Bernice Pauahi
Bishop, Deceased, GREETING:

You are hereby cited and admonished to be and
to appear before the United States Circuit Court
of Appeals for the Ninth Circuit, within thirty (30)
days from the date of this citation, pursuant to an
appeal filed in the office of the clerk of the Supreme
Court of the Territory of Hawaii, in the above-
entitled cause and matter, to show cause, if any
there be, why the decree entered, docketed, filed and
made in the Supreme Court of the Territory of
Hawaii, on to wit, the 13th day of February, 1917, in
the above-entitled matter, wherein it is alleged
manifest error hath happened, should not be cor-
rected, and why speedy justice should not be done
to the parties in that behalf.

WITNESS the Honorable EDWARD DOUG-
LASS WHITE, Chief Justice of the Supreme Court
of the United States of America, this 27th day of
April, A. D. 1917.

[Seal] A. G. M. ROBERTSON,
Chief Justice, Supreme Court of the Territory of
Hawaii.

Service of the foregoing admitted this 27th day of
April, 1917.

HOLMES & OLSON,
Attys. for Trustees, B. P. Bishop Estate. [119]

[Endorsed]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Citation. Filed and issued for service this 27th day of April, 1917, at 3:05 P. M. J. A. Thompson, Clerk. Returned April 28, 1917 at 12:15 P. M. J. A. Thompson, Clerk. [120]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT JUDGE,
FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Praecipe for Transcript.

To JAMES A. THOMPSON, Esquire, Clerk of the
Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in this, the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal heretofore issued by said court and include in said transcript the following pleadings, proceedings, opinions, judgments, exhibits and papers on file in said cause, to wit:

1. Copy petition for allowance of resignation of S. M. Damon as Trustee.

2. Copy resignation of S. D. Damon—Plaintiff's Exhibit "A" and affidavit of Wm. Williamson regarding his residence and religion.
3. Copy of appointment of William Williamson as trustee by justices of the Supreme Court.
4. Communication by trustees under the Will and of the Estate of B. P. Bishop, deceased, addressed to justices of the Supreme Court, asking the appointment of William Williamson in place of S. M. Damon. [121]
5. Copy petition for confirmation of appointment of new trustee.
6. Copy decree of Hon. C. W. Ashford, dated June 9, 1916.
7. Copy opinion and decree of Hon. C. W. Ashford, dated July 29, 1916.
8. Copy opinion and decree of Hon. C. W. Ashford, dated Aug. 3, 1916.
9. Copy notice of appeal and appeal, dated Aug. 3, 1916.
10. Copy of certificate of proof of will.
11. Copy Will of B. P. Bishop, deceased, dated Oct. 31, 1883.
12. Copy 1st codicil to will of B. P. Bishop, deceased, dated Oct. 4, 1884.
13. Copy of certificate of proof of will, dated December 2, 1884.
14. Copy second codicil to will dated Oct. 9, 1884.
15. Copy original transcript of testimony.
16. Copy suggestion of disqualification of justices of Supreme Court.

17. Copy of opinion of Supreme Court of Hawaii, dated Feb. 1, 1917.
18. Copy of decision of Supreme Court of Hawaii on appeal, dated Feb. 13, 1917.
19. Copy of decree of Supreme Court of Territory of Hawaii on appeal with minutes of clerk showing refusal to enter same.
20. Copy of assignment of errors.
21. Copy of order allowing appeal and fixing amount of bond.
22. Copy of supersedeas and cost bond on appeal.
23. Copy of citation on appeal and return of service.
24. Copy of praecipe for transcript.

Dated Honolulu, T. H., this 27th day of April,
A. D. 1917.

CHARLES E. KING,

Appellant.

By E. C. PETERS,

His Attorney. [122]

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Praecipe. E. C. Peters, Attorney for Charles E. King. Filed April 30, 1917, at 12:25 P. M. J. A. Thompson, Clerk. [123]

In the Supreme Court of the Territory of Hawaii.

No. 972.

APPEAL FROM CIRCUIT JUDGE,
FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Amended Praecipe for Transcript.

To JAMES A. THOMPSON, Esquire, Clerk of the
Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of the record in this, the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal heretofore issued by said court, and include in said transcript the following pleadings, proceedings, opinions, judgments, exhibits and papers on file in said cause, to wit:

1. Copy petition for allowance of resignation of S. M. Damon as trustee.
2. Copy resignation of S. M. Damon—Plaintiff's Exhibit "A" and affidavit of Wm. Williamson regarding his residence and religion.
3. Copy of appointment of William Williamson as trustee by justices of the Supreme Court.
4. Communication by trustees under the Will and of the Estate of B. P. Bishop, deceased, addressed to justices of the Supreme Court, asking the appointment of William Williamson in place of S. M. Damon. [124]

5. Copy petition for conformation of appointment of new trustee.
6. Copy decree of Hon. C. W. Ashford, dated June 9, 1916.
7. Copy opinion and decision of Hon. C. W. Ashford, dated July 29, 1916.
8. Copy decree of Hon. C. W. Ashford, dated Aug. 3, 1916.
9. Copy notice of appeal and appeal, dated Aug. 3, 1916.
10. Copy of certificate of proof of will.
11. Copy will of B. P. Bishop, deceased, dated Oct. 31, 1883.
12. Copy 1st codicil to will of B. P. Bishop, deceased, dated Oct. 4, 1884.
13. Copy of certificate of proof of will, dated December 2, 1884.
14. Copy second codicil to will, dated Oct. 9, 1884.
15. Copy original transcript of testimony.
16. Copy suggestion of disqualification of justices of Supreme Court.
17. Copy of opinion of Supreme Court of Hawaii, dated Feb. 1, 1917.
18. Copy of decision of Supreme Court of Hawaii on appeal, dated Feb. 13, 1917.
19. Copy of motion for entry of decree and form of decree with minutes of clerk showing refusal to enter same.
20. Copy petition on appeal.
21. Copy of assignment of errors.
22. Copy of order allowing appeal and fixing amount of bond.

23. Copy of supersedeas and cost bond on appeal.
 24. Copy of citation on appeal and return of service.
 25. Copy of praecipe for transcript.
 26. Copy of amended praecipe for transcript. [125]
- Dated at Honolulu, T. H., this 2d day of May,
A. D. 1917.

CHARLES E. KING,
Appellant.
By E. C. PETERS,
By F. SCHNACK,
His Attorney.

[Endorsement]: No. 972. In the Supreme Court of the Territory of Hawaii. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Amended Praecipe for Transcript. Filed May 2, 1917, at 4:15 P. M. J. A. Thompson, Clerk. E. C. Peters, Attorney for Charles E. King. [126]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

APPEAL FROM CIRCUIT JUDGE,
FIRST CIRCUIT.

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

Certificate of Clerk to Transcript of Record.

Territory of Hawaii,
City and County of Honolulu,—ss.

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the

petition on appeal herein filed a copy whereof is attached to the foregoing transcript of record, being pages 106 to 107, both inclusive, and in pursuance to the Amended Praecipe to me directed, a copy whereof is hereto attached, being pages 124 to 126, both inclusive, DO HEREBY TRANSMIT to the Honorable United States Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 105, both inclusive, pages 113 to 115, both inclusive, and pages 121 to 123, both inclusive, AND DO HEREBY CERTIFY *that* the same to be full, true and correct copies of the pleadings, record, proceedings, minutes, opinion and decree which are on file and of record in the office of the Clerk of the Supreme Court of the Territory of Hawaii, in a cause entitled "In the Matter of the Estate of Bernice Pauahi Bishop, Deceased" (Number 972).

I DO FURTHER CERTIFY that the original Assignment of Errors, and admission of service of copy thereof by Messrs. Holmes & Olson, attorneys for the appellees, being pages 108 to 112, both inclusive, the original Order Allowing Appeal and Fixing Amount of [127] Bond, being pages 116 to 118, both inclusive, and the original Citation and admission of service of copy thereof by Messrs. Holmes & Olson, attorneys for the appellees, being pages 119 to 120, both inclusive, of the foregoing transcript are herewith returned.

I ALSO CERTIFY that the cost of the foregoing transcript of record is \$33, and that said amount has

been paid by the appellant herein, through his attorney.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 7th day of May, A. D. 1917.

[Seal] JAMES A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii. [128]

[Endorsed]: No. 3000. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Estate of Bernice Pauahi Bishop, Deceased. Charles E. King, Appellant, vs. William O. Smith, E. Faxon Bishop, Albert F. Judd and Alfred W. Carter, as Trustees Under the Will and of the Estate of Bernice Pauahi Bishop, Deceased, Appellees. Transcript of Record. Upon Appeal from the Supreme Court of the Territory of Hawaii.

Filed May 16, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

CHARLES E. KING, Appellant,
vs.

WILLIAM O. SMITH, E. FAXON BISHOP,
ALBERT F. JUDD and ALFRED W. CAR-
TER, as Trustees Under the Will and of the
Estate of BERNICE P. BISHOP, Deceased,
Appellees.

Brief of Appellant

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

E. C. PETERS,
Attorney for Appellant

Filed this day of, 1917.

F. D. MONCKTON, Clerk.

By....., Deputy Clerk.

FILED

OCT 9 - 1917

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of the Estate of BERNICE PAUAHI
BISHOP, Deceased.

CHARLES E. KING, Appellant,
vs.

WILLIAM O. SMITH, E. FAXON BISHOP,
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TER, as Trustees Under the Will and of the
Estate of BERNICE P. BISHOP, Deceased,
Appellees.

Brief of Appellant

Upon Appeal from the Supreme Court of the
Territory of Hawaii.

E. C. PETERS,
Attorney for Appellant

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Brief of Appellant

STATEMENT OF FACTS

Bernice Pauahi Bishop died testate in Honolulu on October 16, 1884, leaving a last will and testament, including two codicils, which was admitted to probate December 2, 1884, in the Supreme Court of the Territory of Hawaii, which court at that time had jurisdiction of probate and equity matters.

In the said will the said Bernice Pauahi Bishop, after making a number of devises and bequests, devised the residue of her estate to five trustees therein appointed, and directed that they use the said residue in the erection and maintenance in the Hawaiian Islands of certain schools to be called the Kamehameha Schools.

The trustees are given considerable discretion and power in the matter of selling, investing and reinvesting, and so on, the estate, it being provided that a portion of the income for each year be devoted to the support and education of orphans and others in indigent circumstances, giving the preference to Hawaiians of pure and part aboriginal blood.

In and by the fourteenth paragraph of her will Mrs. Bishop appointed her husband Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke and William O. Smith, all of Honolulu, "to be her trustees to carry into effect the trust" specified in

the will, the said paragraph containing this further provision:

“I further direct that the number of my trustees shall be kept at five; and that vacancies shall be filled by the choice of the majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant religion.”

Vacancies have occurred from time to time in the personnel of the board of trustees. On June 9, 1916, the written resignation of Samuel M. Damon as a trustee was presented to the First Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, who at chambers exercises original jurisdiction in equity and who has original jurisdiction of the trust created by said will. The resignation was accepted, and on the same day a request was presented to the Justices of the Supreme Court of the Territory of Hawaii, calling to their attention the resignation of the said Samuel M. Damon as trustee and asking for the appointment of a new trustee in his place.

William Williamson was appointed by the said Justices to fill the vacancy. Thereupon and thereafter on the same day, the trustees presented to the First Judge of the First Circuit Court aforementioned, a petition setting forth the facts of the vacancy, the appointment of William Williamson by the Justices of the Supreme Court, that William Williamson “is a person of the Protestant religion,” and prayed that

his appointment as such trustee be confirmed by the said First Circuit Judge. A hearing of the said petition was immediately had when certain evidence touching the qualifications and fitness of the said William Williamson as such trustee was introduced. Thereafter and on the 29th day of July, 1916, the said Circuit Judge in an "Opinion and Decision" decided that the appointment of the said William Williamson as aforesaid was without authority, null and void, and he further made an order appointing Charles E. King as trustee to fill the vacancy created by the resignation of Samuel M. Damon as aforesaid and fixed his bond in the sum of \$20,000.00.

On August 3, 1916, a decree was signed and filed by the said Circuit Judge in conformity with his said opinion. From this the remaining trustees appealed to the Supreme Court of the Territory of Hawaii, which said Supreme Court on the 1st day of February, 1917, rendered its opinion followed by a decision filed on the 13th day of February, 1917, in which it reversed the decree of the said Circuit Judge appealed from.

From this opinion and the decision entered thereon the present appeal has been taken to the United States Circuit Court of Appeals for the Ninth Circuit, and the question now is as to the correctness of the ruling of the Supreme Court of the Territory of Hawaii.

Previous to the hearing of the appeal in the Supreme Court of the Territory of Hawaii, a suggestion of the disqualification of the Chief Justice and of

Associate Justice Quarles, because of pecuniary interest, was filed, the Court deciding that neither of the members named was pecuniarily interested in the cause.

BRIEF OF ARGUMENT ON DISQUALIFICATION.

Section 84 of the Organic Act of the Territory of Hawaii provides: "That no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, or in the issue of which the said judge or juror has, either directly or through such relative, any pecuniary interest; nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the legislature of the Territory may add other causes of disqualification to these herein enumerated."

1 A. By Section 84 of the Organic Act of the Territory of Hawaii, "pecuniary interest", direct or indirect, is a judicial disqualification.

The disqualifying interest may be indirect as well as direct. And the judge may be disqualified even though not a party to the proceeding.

1 B. The justices of the Supreme Court of the Territory of Hawaii claim to be donees of a power of appointing trustees under the provisions of the trust created by the will of Bernice Pauahi Bishop, the legal-

ity of the exercise of which is the direct subject of controversy in this case.

The action of the several justices of this court in appointing William Williamson, Trustee under the will and of the estate of Bernice Pauahi Bishop, deceased, in place of and in succession to Samuel M. Damon, resigned, was in the pretended exercise of the power of appointing new trustees under the fourteenth clause of the will of said decedent. And the only point involved in this proceeding is the legality of the appointment of Mr. Williamson.

This claim of power is a "personal" as well as a "property" interest. And is a disqualifying interest under the provisions of the Organic Act.

1 C. "Pecuniary interest" means "personal interest" or "property interest" and an "interest affecting individual rights."

The words "interest" and "pecuniary interest" are used interchangeably in the statutes of the several states fixing disqualifications of judges. Section 84 of the Organic Act would be just as potent if it simply made "interest" of the judge a disqualification. An examination of the authorities indicates that "pecuniary interest" or "interest" involves "individual rights" as well as "pecuniary" or "property" interest.

In *Clyma vs. Kennedy*, 64 Conn. 310, 42 A. S. R. 195, Statute of Conn., disqualified for "interest", the court said: "He had no pecuniary interest in the subject matter of the action. It was not his own cause."

In Mississippi, a judge is disqualified when "interested in the cause". In *Ferguson vs. Brown*, 21 Southern 603-607, the court held: "The interest which disqualified a judge under the constitution is not the kind of interest which one feels in public proceedings or public measures. It must be pecuniary or property interest or one affecting his individual rights; and the liability or pecuniary gain or relief to the judge must occur upon the event of the statute, not result remotely in the future from the general operation of laws and government upon the statutes fixed by the decision."

In Texas the statute provides that "no judge of the county court shall sit in any case wherein he may be interested." In *Wallis vs. McInness*, 44 S. W. (Texas) 537, Wallis as county judge brought suit against McInness for the use and benefit of the county, upon a certain supersedeas bond executed and payable to Wallis as such officer. The court held: "The interest which disqualifies a judge from sitting in case does not signify every bias, partial prejudice which he may entertain with reference to the case and which may be included in the broadest sense of the word 'interest' as commonly distinguished from its use as indicating a pecuniary personal privilege in the same way dependent upon the result of the case."

Also in *Casey vs. Kinsey*, 23 S. W. (Texas) 818, the court said, citing the Castlebury case: "To constitute such interest as herein disqualifies the judge within the meaning of this section from presiding it is not necessary that he should be a party. It is suffi-

cient if he is in any wise interested in the subject matter."

In Nebraska the statute provides: "The judge * * * is disqualified from acting as such * * * in any case wherein he is interested * * *." In *Chicago B. and G. R. Co. vs. Kellogg*, 74 N. W. (Nebr.) 403-404, the court held: "The word interested found in this section of the statute probably means 'pecuniarily interested' or at least it means that a judge to be disqualified from hearing a case must be in such a situation with reference to it or to the parties that he will gain or lose something by the result of the action on trial."

The statute of Minnesota provides: "No Judge * * * shall sit in any cause in which he is interested * * * or would be excluded from sitting as a juror." The statute in relation to jurors provides that the grounds for challenge are "consanguinity or affinity within the 9th degree, or any one of the attorneys either for the prosecution or the defense." In *Sjorberg vs. Nordin*, 5 N. W. (Minn.) 677, the court held: "A pecuniary interest in the event of the action is the cause of disqualification intended to be reached by the section and not a mere bias resulting from partiality or prejudice in favor or against either of the parties."

The Alabama statute places "interest" as a disqualification. In *Ex parte Alabama State Bar Assn.* 8 So. (Ala.) 768-770, the court held: "The interest

which will disqualify must be a pecuniary one or one affecting the individual rights of the judge. Moreover, liability or pecuniary gain or relief to the judge must occur in the event of the case, not result remotely in the future from the general operation of law upon the statutes fixed by the decision."

The statute of Florida provides: "No judge of any court or justice of the peace shall sit or preside in any cause to which he is a party or in which he is interested or in which he would be excluded from being a juror by reason of interest, consanguinity or affinity to either of the parties * * *. In *Ex parte Harris*, 6 L. R. A. (Fla.) 713, the court held: "The interest that disqualifies a judge under the statute is a property interest in the action or its result in contradistinction of an interest of feeling or sympathy or both that would disqualify a juror."

In Vermont, one of the disqualifications is "interest". In *State vs. Sutton*, 52 Atl. (Vt.) 116, the court held this to mean "pecuniary interest".

In *Phillips vs. Curley*, 62 Pac. (Colo.), a judge who was a candidate for reelection on the Bryan Democratic ticket was held disqualified for reason of "interest" in an appeal from the County Clerk rejecting a protest against placing the nominations of said party on the official ballot.

1 D. If "pecuniary interest" in the sense of interest involving money or value, alone controls, the judge might sit upon and decide the legality of his own acts

as a donee of powers, of which the following are a few illustrations:

1. Donee of power of attorney, not coupled with an interest.
2. Collateral donee of power of appointment to a use, or legal estate.
3. Donee of power to appoint co-executor.
4. Surviving trustee as donee of a power of appointing new co-trustee.

The illustrations merely involve "individual rights". No pecuniary gain or loss is involved. And yet the judge would practically be sitting as a judge of his own cause if he were to attempt to decide the legality of an act performed by him as an attorney in fact. The collateral donee of a power of appointment has no estate in the property subject to the power and yet the donee of that power could not sit as a judge upon the question of the legality of its exercise. Should an executor have testamentary power of appointing a co-executor, it would merely be a question of individual rights. Likewise as to the power of a surviving trustee or trustees to appoint a new co-trustee.

1 E. The statute pertaining to judicial disqualification should be liberally construed.

In the case of *Mining Co. vs. Keyser*, 58 Cal. 315-322, the court held: "This provision should not receive a technical or strict construction, but rather one that is broad and liberal" and quoting from the Supreme Court of Michigan: "The court ought not to be

astute to discover refined and subtle distinctions to save a case from the operation of the maxim when the principle it embodies bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance."

In *Oakley vs. Aspinwall*, 3 N. Y. 547, 552, the court holds: "It is the design of the law to maintain the purity and impartiality of the courts, and to insure for their decisions the respect and confidence of the community. Their judgments become precedents which control the determination of subsequent cases, and it is important in that respect, that their decisions should be free from all bias. After securing wisdom and impartiality in their judgments, it is of great importance that the courts should be free from reproach or the suspicion of unfairness. The party may be interested only that his particular suit should be justly determined, but the state—the community—is concerned not only for that, but that the judiciary shall enjoy an elevated rank in the estimation of mankind."

BRIEF OF ARGUMENT ON MERITS.

1. Assuming the words "choice" and "selection" are synonymous with "appoint" the fourteenth clause of the will of the testator reposed the power of appointment in the Supreme Court as a court, and not in a majority, for the time being, of the members thereof.

A. The Supreme Court in banco at the time of the execution of the will had authority to appoint trustees.

1 A 1. The Supreme Court was vested with general equity jurisdiction.

By the constitution of 1852 (Art. 84) the "judicial power" of the Kingdom was defined as including all cases in equity arising under any law of the Kingdom. By Article 81 of the same constitution, the "judicial power" of the Kingdom was vested in the Supreme Court and in such inferior courts as the Legislature might from time to time establish. And by Article 85, its administration was to be "divided" among the Supreme Court and the several inferior courts of the Kingdom in such manner as the Legislature might from time to time indicate. By Article 83, the Legislature was authorized to organize Circuit Courts, not less than four.

The Legislature, pursuant to the power reposed in it, divided the "judicial power" between the Supreme, Circuit and police courts.

By the Act of May 26th, 1853, (Section 2), entitled "An Act relating to the Judiciary Department" to be found in Chapter 13 of the Civil Code of 1859, there was conferred upon the Supreme Court "jurisdiction of all cases * * * in equity * * * whether brought before it by original writ, by appeal or otherwise". (Sec. 829, C. C. 1859.) By the same Act (Sec. 883 C. C. 1859) original jurisdiction in certain equity matters was conferred upon the several circuit courts.

In each court therefore accordingly as the "judicial power" was "divided" was reposed jurisdiction in equity over certain matters within equitable cognisance.

By Article 82 of the constitution of 1852, it was provided that the Supreme Court should consist of a Chief Justice and two associate justices. This was enacted into law by the "Act relating to the Judiciary Department" (*supra*) Sect. 1, found in Section 827, C. C. 1859.

Hence the Supreme Court consisting of a Chief Justice and two associate justices had under the law existing in 1859 jurisdiction in equity "of all cases in * * * equity * * * whether the same be brought before it by original writ, by appeal or otherwise."

By the constitution of 1864 (Art. 66) and of 1887 (Art. 67) the "judicial power" was referred to in substantially the same terms. It was vested in the same courts (Const. 1864, Art. 64. Const. 1887, Art. 64). And its "division" among the several courts was left

to the ultimate prescription of the Legislature. (Const. 1864, Art. 66. Const. 1887, Art. 66.)

Hence it is to the question of "division" of the "judicial power" that we must first direct our attention to determine in what court or courts the power of appointment of trustees was reposed by the Legislature.

Unquestionably under the Constitution of 1852, and the provisions of Section 829, C. C. 1859, the Supreme Court was clothed with equitable jurisdiction in general terms and consequently possessed jurisdiction over all matters of equity except such as were conferred in terms of exclusion upon the "inferior courts."

An examination of the statutes discloses nothing from which could be argued that the Legislature prior to the Judiciary Act of 1892 (Ch. 57, S. L. 1892) took from the Supreme Court its general equity jurisdiction over trusts. The decision of the Supreme Court of the Territory of Hawaii, as a matter of fact, is to the contrary. *Asing vs. Aiona*, 6 Haw. 281.

When we speak of "division" of the "judicial power" we are considering courts and not the individual members of the courts. The several constitutions of the Kingdom refer to the "judicial power" as divided among the "Supreme Court and the several inferior courts."

Whatever of division there was by the Legislature of the powers of the court among its members sitting at "Chambers", whether we adopt the reasoning that a justice at Chambers was a separate court or a part

of the court, is another question which we will dispose of later.

And hence we can say that not until the Judiciary Act of 1892 became operative was there reposed in the Circuit Courts any equitable jurisdiction over trusts.

1 A 2. One justice could hold the court.

The constitution, however, of 1852 (Art. 82) and of 1887 (Art. 65), provided that any of the justices of the Supreme Court might hold the court. This provision was omitted from the constitution of 1894 in view of the passage of the Judiciary Act, making the Supreme Court with certain exceptions a court of purely appellate jurisdiction.

1 A 3. System of Chamber sittings results from:

(a) *Power of one justice to hold the court*

(b) *Powers of Chancellor*

(c) *Powers of Vice Chancellor*

(d) *Powers of Justices generally.*

The Legislature under its power "to make all manner of wholesome laws" * * * "not contrary" * * * "or repugnant" to the Constitution (Const. of 1852, Art. 62, and of 1887, Art. 47) took advantage of the provision that one of the justices of the Supreme Court might hold the court to establish a branch of the court denominated "A Judge at Chambers".

The constitution of 1852 further provided that the Chief Justice should be the Chancellor of the Kingdom (Art. 86). This was repeated in the constitution of

1864 (Art. 68) and in the constitution of 1887 (Art. 68). And all the constitutions further conferred upon him such jurisdiction in equity as might be conferred upon him by law.

And pursuant to that power, the Legislature conferred upon the Chief Justice all powers incident to the office of "Chancellor" at Common Law and powers at Chambers to decree the foreclosure of mortgages and generally to hear and determine all matters in equity. (C. C., 1859, Sec. 847.)

The First Associate Justice was constituted a Vice Chancellor with full and concurrent jurisdiction in all matters at Chambers with the Chancellor. (*Id.*)

By Section 4 of the Judiciary Act of 1853, it was provided that the Chief Justice and the two associate justices should respectively have all the powers at Chambers conferred by the then existing laws upon the Chief Justice and Associate Justice.

This provision is not found in so many words in the Civil Code of 1859. By Section 852 of the Code, the several justices were granted powers at Chambers *eo nomine* to admeasure dower and partition real estate. Nothing further appears, but a examination of the statutes does not disclose any amendment or repeal of the provisions of Section 4 of the Judiciary Act conferring upon all the justices the powers reposed in the Chief Justice at Chambers. We are convinced that the power of the associate justice, to "hold the court" in the absence of distinct powers at Chambers was

sufficient to vest in him all the powers in equity possessed by the court.

The system of judges sitting at Chambers was inaugurated without question under the provision allowing one justice to "hold the court" coupled with the ancillary jurisdiction reposed in the Chief Justice as Chancellor and the Associate Justice. We take it that the term "Chancellor" in itself does not confer jurisdiction but is merely the term applied to the presiding judge of the court sitting in equity as understood at Common Law.

It cannot, however, be said that the only time the Third Associate Justice exercised equity powers was when he was holding the court. The Third Associate Justice, under Section 4 of the Act, has all the powers at Chambers of the Chief Justice and First Associate Justice. And if they had called him the Second Vice Chancellor, no greater power could have been conferred upon him thereby.

When one of the justices sat alone at Chambers, he was sitting as the sole member of the court. It was only under the power that one justice might hold the court that the Legislature could assume to confer the equitable powers aforesaid in the court to a branch thereof, to-wit: a Justice at Chambers.

1 A 4. Jurisdiction of the justice at Chambers was concurrent with that of the court.

Nowhere in either the Civil Code of 1859 or the Compiled Laws of 1884 can anything be found which

either expressly or by implication can be taken as a deprivation of the equity powers of the Supreme Court as a court in banco. That the Chief Justice and First Associate Justice as Chancellor and Vice Chancellor respectively and the Third Associate Justice exercised certain powers in equity does not detract from this contention. The jurisdiction at Chambers was simply concurrent with that of the full court.

A similar instance of concurrent jurisdiction is to be found in the grant of admiralty jurisdiction upon the court, (Sec. 829, C. C. 1859), and upon the Chief Justice (847, *Id.*)

In *Fessdon vs. Cargo of Ship Charles* (1 Haw. 863) the court holds that it has jurisdiction in admiralty and this power *might* be exercised by the Chief Justice at Chambers. In *Spencer vs. Bailey, et al.* (1 Haw. 187) the court holds that the court has jurisdiction in admiralty.

That similar jurisdiction is conferred upon another court does not mean that the court originally exercising jurisdiction is deprived thereof. The jurisdiction is concurrent. *Brewer vs. Chase*, 3 Haw. 127, 136. *Bailey vs. City of New Haven*, 60 Conn. 314, 22 Atl. 945, 14 L. R. A. 69-75. *Bowditch vs. Banuelos*, 67 Mass. (1 Gray), 220.

This status of the Supreme Court continued through 1883 with the exception that by Act 39 of the Laws of 1876, the powers and duties possessed and exercised by the First Associate Justice of the Supreme Court

were conferred upon the Second Associate Justice. (See Compiled Laws 1884.)

1 A 5. The only difference between the court and judge was the decree of the judge was not conclusive.

Hence in October, 1883, at the time of the execution of the will in question, the law permitted a petition for the appointment of a trustee to be filed before a justice of the Supreme Court in Chambers or the Supreme Court in Banco.

The will provided, however, that vacancy should be filled by a majority of the Justices of the Supreme Court. And hence the method indicated by the will was before a full court or a majority thereof.

The constitution of 1852, Article 87, and the constitution of 1887, Article 69, provided that the decisions of the Supreme Court made by a majority of the justices would be final and conclusive upon all the parties.

And it was to the court in Banco that the testator contemplated that the petitions for the filling of vacancies should be addressed.

Whether the Supreme Court in Banco sat originally or on appeal, its decisions were only conclusive when joined in by a majority and this rule made it necessary that parties litigant who invoked the jurisdiction of the Justices at Chambers have an opportunity of securing a decision which was "conclusive". Hence the statutes upon appeal from the Justice at Chambers to the full court in Banco.

Hence the only difference between the decisions of the court and the decisions of the judge at Chambers was in the latter case the decision was not conclusive. And the methods of appeal granted were simply in furtherance of the Supreme Court's method of securing a hearing by a full court and making the decision conclusive.

The appeal from the judge at Chambers to the full court could not be considered a method of appeal nor could the hearing by the full court be considered in furtherance of its appellate jurisdiction. The appellate jurisdiction of the Supreme Court, prior to the passage of the Judiciary Act of 1892, strictly speaking, was the jurisdiction to hear cases upon appeal from the Circuit and Police Courts. Exceptions to the Court in Banco were only allowed when the court refused on motion to refer the question involved to the full court. (11 Jud. Act. 1853.) Review by appeal was only from the Circuit and District Courts.

Hence the error of the trustees in this case in assuming that the jurisdiction of the Supreme Court in equity matters was only appellate.

It was only upon the passage of the Judiciary Act of 1892 that the Supreme Court became a purely appellate court with the exception of such original jurisdiction as was reposed in it for the purpose of assisting its appellate functions. (*Wahiawa Sugar Co. vs. Wai-
alua Agricultural Co.*, 13 Haw. 511.)

1 A 6. Jurisdiction as exercised by the Supreme Court prior to the Judiciary Act of 1892 is not replicated in the system as devised for the Circuit Courts by that Act.

Whereas both by the several constitutions of the Kingdom referred to and the acts of the Legislature passed in conformity thereto, general equity powers were reposed in the Supreme Court and in addition thereto the several justices were given certain powers in equity at Chambers, the Judiciary Act of 1892 clearly demarks the jurisdiction of the Circuit Court and the respective judges of that court at Chambers. By Section 36 of the Act, C. L. 1897, Sec. 1144, it is provided: "The several Circuit Courts shall have jurisdiction * * * as follows:" And by Section 37 of the Act (C. L. 1899, Sec. 1145) it is provided: "The judges of the several Circuit Courts shall have power in Chambers within thier respective jurisdiction * * * as follows:" By the latter section, there is reposed in the Circuit Judges at Chambers power "to hear and determine all matters in equity". But in the former section in respect to the powers of the Circuit Court, not a word appears from which could be implied any equity powers in the court.

And although the same judge that may sit at Term may also sit at Chambers, each constitutes a separate and distinct branch of the other. Collectively the two systems may constitute the Circuit Court, but individually they are separate and distinct. (*Adams vs.*

Parke, 6 Haw. 276-278) (*Silva vs. Souza*, 14 Haw. 46). (*Weston National Bank vs. Peacock*, 18 Haw. 161). (*Kendall vs. Holloway*, 16 Haw. 45). (*Carter vs. Judge*, 16 Haw. 242). (*Kala vs. Mills*, 15 Haw. 422).

B. Reason and authority indicate the intention of the testator to repose the power in the court and not in its individual members.

1 B 1. Reasons:

- (a) Court authorized by law to appoint trustees.*
- (b) Judicial arm of organized government.*
- (c) Experience in similar matters.*
- (d) Publicity of action.*
- (e) Protection by safeguards surrounding judiciary.*
- (f) Judicial judgment in contradistinction to individual judgment.*

In the first place the provision of the testator is directed to the court for the reason that it is by statute authorized to make appointments. This statutory authority reposed in the court is the lodestone which attracts the donor of the power. The simple process of reasoning indicates to his mind that wherever the power of appointment is reposed by law there will be found the most competent persons to indulge in its exercise.

In the next place the power when reposed in the court is impressed with the sanctity of judicial in contradistinction to individual exercise. It reposes in

a part of the organized system of government which appeals to the layman.

Further, the judges exercising the functions of the court are supposed to represent the greatest experience on the subject. And in the exercise of their functions to draw on that experience and the learning and impartiality with which this high office is characterized. Again the regular and orderly administration of justice contemplates a hearing publicly had and an appointment which would justify the power reposed in the court. Moreover the court is surrounded by the safeguards absent from the individual. The testator naturally in seeking the assistance of the court, seeks all its attributes, the greatest of which is the administration of "justice."

1 B 2. *Authorities.*

From the authorities that we have been able to examine, it would seem that courts lean toward interpretations of similar grants of powers of appointment to judges of courts exercising jurisdiction over trusts that repose the power in the judge or judges officially and the exercise of that power judicially.

We believe that the following authorities sustain the contention that the testator intended that the court, and not the individual members thereof, for the time being, should exercise the power of appointment which the court then constitutionally held: *In re Estate of Bernice Pauahi Bishop*, 11 Haw. 33. *Carr vs. Corning*, 73 N. H. 362, 62 Atl. 168. *Harwood vs. Tracy*,

118 Mo. 631, 636-7-8. *Leman vs. Sherman*, 117 Ill. 657, 664. *Morrison vs. Kelly*, 22 Ill. 609. *Allen's Appeal*, 69 Conn. 702-707. *Wilcox's Appeal*, 54 Conn. 320, 14 Atl. 136. *Massachusetts General Hospital vs. Armory*, 39 Mss. (12 Pick.) 445. *Tuckerman vs. Currier*, 129 P. (Colo.), 210, 215. *Perry on Trusts*, Sec. 296.

1 C. *The Supreme Court of the Territory of Hawaii has interpreted the act of appointing a substitute trustee as a judicial function.*

The Supreme Court in filling the vacancy left by the resignation of William O. Smith indicated by its actions in that regard that the power was reposed in the court and not the individual members thereof. On September 31st, 1886, William O. Smith tendered his resignation from Pomona, Los Angeles County, California. This was entitled, In the Supreme Court of the Hawaiian Islands, and was addressed "To the Honorable Justices of the Supreme Court of the Hawaiian Islands" and was filed in the Supreme Court by Henry Smith, Deputy Clerk, on October 21st, 1886. No formal petition seems to have been filed, and the matter apparently was taken up by the court upon the filing of the resignation. For on the same day, October 21st, 1886, the Clerk's Minutes of Henry Smith, Deputy Clerk, discloses a hearing before Judd, C.J., and McCully, J.

The following order appears on the Clerk's Minutes: "The court refers to the will of the deceased in

accordance with Article 14 of said will and knowing that said nominee is a person of the Protestant religion appointed said Joseph O. Carter as a Trustee to fill the vacancy.”

“The court on the same day over the signature of A. F. Judd, L. McCully and Edward Preston entered its formal decree entitled in the court, accepting the resignation of Mr. Smith and appointing J. O. Carter as his successor and requiring that the Trustees file a bond in the sum of \$25,000.00 for the faithful performance of their duties as such.”

The entire proceedings before the Supreme Court is entitled “In the Matter of the Estate of Bernice Pauahi Bishop, Deceased, Probate Division 2425.”

II. At best, in the absence of an absolute delegation of the power of appointment upon the court as such, a majority of the justices of the Supreme Court have merely the power of nomination and the refusal of the trial judge to appoint the justices' nominee should be sustained.

II A. Significance of terms employed in clause fourteen of the will.

By the fourteenth clause of the will of the testator, the power reposed in the majority of the justices of the Supreme Court was simply one of choice. The provision is “that vacancies shall be filled by the *choice* of a majority of the justices.” In other words, their power was limited to a choice or nomination of a trustee. And that the actual appointment rested with the judge or tribunal then exercising equity jurisdiction,

that is, either of the justices of the Supreme Court at Chambers, or the court in Banco. And the power in equity having been transferred by the Judiciary Act from the Supreme Court to the Circuit Judge at Chambers, a majority of the justices of the Supreme Court may only choose or nominate and it rests finally in the sound discretion of the Circuit Judge at Chambers to appoint. (See *Ogden vs. Smith*, 2 Paige, N. Y. 195.)

II B. Action of trustees and Circuit Judges in equity since January, 1893.

And this seems to have been the attitude of the several trustees as vacancies occurred. When confronted at the trial court with intimation that if a majority of the justices had an absolute power of appointment that the Circuit Judge at Chambers was without jurisdiction the trustees were placed in rather an inconsistent position. For surely if there is an absolute delegation of authority to a majority of the justices of the Supreme Court, what was the necessity for any appearance before the Circuit Judge at Chambers for the purpose of so-called confirmation?

It seems to us that the method invoked by the trustees since 1886 indicates that they considered and the several Circuit Judges considered that the authority of the Justices of the Supreme Court was simply that of nomination and that the Circuit Judge at Chambers in Equity actually made the appointment.

This is indicated in the following instances: Resignation of Charles M. Cook and appointment of William F. Allen as substitute trustee on April 8th, 1897; resignation of S. M. Damon and appointment of W. O. Smith as substitute trustee, November 12th, 1897; resignation of Charles R. Bishop and appointment of S. M. Damon as substitute trustee, January 11th, 1898; death of C. W. Hyde and appointment of Alfred Carter, substitute trustee, January 6th, 1911; W. F. Allen resigned and appointment of E. F. Bishop as substitute trustee December 13th, 1904; A. W. Carter resigned and appointment of A. F. Judd as substitute trustee March 7th, 1908; J. O. Carter died and appointment of A. W. Carter as substitute trustee March 22nd, 1909.

II C. Nomination not binding on Circuit Judge.

The nomination of a trustee is not binding upon the appointing power although the nomination is made in accordance with the provisions concerning the filling of vacancies in the office of trustee contained in the instrument creating the trust. (*Appeal of Wilcox*, 8 Atl. Conn. 136-138. *Griswold et al. vs. Sacktu et al.* 42 Atl. R. I. 868. *Yates vs. Yates*, 99 N. E. Ill. 360-363. Loring "A Trustee's Handbook" pg. 19. *Bowditch vs. Banuelos*, 1 Gray 220, 231. *Montefcore vs. Guedalla*, L. R. 1903, 2 Ch. 723.

II D. Court found as a fact the nominee not a fit and proper person.

The refusal of the Circuit Judge at Chambers to appoint the nominee of the majority of the justices of the Supreme Court should be sustained upon the findings of the Judge that the nominee is not a fit and proper person. The trial judge held that there was no evidence to show that Mr. Williamson was a fit and proper person to be appointed.

The Kamehameha School Trust is a quasi public trust. It involves the education of the Hawaiian youth of both sexes. And the trial judge found that it had not been made to appear that he was qualified by length of residence in Hawaii, or by familiarity and sympathy with the history, manners, customs, language and ideals and aspirations of the Hawaiian people as to mark him out as a fit and suitable person to be appointed to an office where he would be authorized and expected to exercise a wide, benevolent and sympathetic discretion in the education of Hawaiian youth of either sex, concerning the general scheme, system and regulations to be adopted and observed during their attendance at the schools in question.

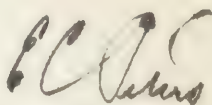
We believe that this finding should not be disturbed. That a contrary finding was not made in respect to Mr. King, the appointee, is immaterial.

We have taken the liberty of referring to the opinion of the trial judge, considering that questions involved have been therein set forth more clearly and forcibly than we are able to do. And if we seem in the main to cite the same decisions, it is not for want of

research, but for the limitations of the authorities upon the particular points involved.

We have not attempted in this brief to go into or cite authority upon the general powers of equity or the general rules concerning the granting of the power of appointment by trustors in testamentary trusts.

We respectfully submit that the decree of the First Circuit Judge of the First Judicial Circuit sitting at Chambers in Equity should have been sustained and that therefore the Supreme Court of the Territory of Hawaii erred in rendering its opinion of February 1, 1917, holding William Williamson to have been properly appointed.

A handwritten signature in dark ink, appearing to read "P. C. Jones". The signature is stylized with large, bold letters and a prominent flourish at the end.

Attorney for Charles E. King.

service of the within Brief of the Appellant and receipt of a copy thereof
is acknowledged this ~~26th~~ day of September, A. D. 1917.

Arthur M. Brown
Attorneys for Appellees.

NO. 3000

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE
NINTH CIRCUIT

CHARLES E. KING,

Appellant.

vs.

WILLIAM O. SMITH, E. FAXON BISHOP, AL-
BERT F. JUDD and ALFRED W. CARTER,
as Trustees under the Will and of the Estate of
Bernice Pauahi Bishop, deceased,

Appellees.

BRIEF FOR APPELLEES

HENRY HOLMES,
CLARENCE H. OLSON,
PAUL R. BARTLETT,
Attorneys for Appellees.

Filed this day of, 1917.

F. D. MONCKTON, Clerk.

By, Deputy Clerk.

Filed

OCT 9 1917

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WILLIAM O. SMITH, E. FAXON
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Trustees under the Will and of
the Estate of Bernice Pauahi
Bishop, deceased,

Appellees.

*Appeal from
the Supreme
Court of the
Territory of
Hawaii.*

BRIEF FOR APPELLEES.

STATEMENT.

Mrs. Bernice Pauahi Bishop of Honolulu, Hawaii, died testate in Honolulu, October 16, 1884, leaving an estate of great value, the residuary and larger portion of which was bequeathed and devised to five trustees "to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for

boys and one for girls, to be known as, and called the Kamehameha Schools." Other provisions of a charitable nature were contained in the Will.

Will and Codicils, Record, pp. 73-91.

Having provided for the creation of a large charitable trust, the testatrix in the fourteenth clause of her will provided for the appointment of trustees in succession as vacancies should occur in the natural course of events. It is the language of this clause that the Supreme Court of the Territory of Hawaii has construed, deciding that by it a power of appointing new trustees was given to the majority of the persons who comprised the justices of the Supreme Court of Hawaii. It is from this construction that appellant has appealed to this Court.

The fourteenth clause reads as follows:

"Fourteenth: I appoint my husband Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke, and William O. Smith, all of Honolulu, to be my trustees to carry into effect the trusts above specified. I direct that a majority of my said trustees may act in all cases, and may convey real estate, and perform all of the duties and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant Religion."

The Supreme Court of Hawaii held, reversing the Circuit Judge, that this clause gave a naked power of appointing new trustees to a majority of the justices of the Supreme Court, acting in their individual

as distinguished from their judicial capacity; that, therefore, the fact that the Supreme Court as a judicial tribunal was divested of original equity jurisdiction subsequent to the death of Mrs. Bishop, was wholly without effect and that a majority of the justices of the Supreme Court, acting as individuals and as donees of the naked power contained in the Fourteenth clause of Mrs. Bishop's Will, were not deprived of the right of appointment given by the testatrix. Therefore the Court held that the appointment of William Williamson of Honolulu as a successor in trust to Samuel M. Damon, resigned, was rightfully and properly made under the terms of the Fourteenth clause of Mrs. Bishop's Will.

On June 9, 1916, the resignation of Samuel M. Damon as one of the five trustees was accepted by the Circuit Judge possessing original equity jurisdiction, and he was discharged from the trusts, and upon the same day the Justices of the Supreme Court appointed William Williamson a successor in trust to Samuel M. Damon, the appointment being in writing as follows:

"WHEREAS, Samuel M. Damon, one of the Trustees under the Will and of the Estate of Bernice Pauahi Bishop, late of Honolulu, deceased, has resigned his office as such Trustee; and

"WHEREAS, by reason of such resignation a vacancy in said office now exists; and

"WHEREAS, in and by the said Will it is provided that vacancies in the offices of the Trustees under said Will and of said Estate shall be filled by a majority of the justices of the Supreme Court, the se-

lection to be made from persons of the Protestant Religion:

“NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That the undersigned Justices of the Supreme Court of the Territory of Hawaii, being a majority of the Justices of the said Supreme Court, by virtue and in exercise of the power for this purpose given to them in and by said Will, do hereby appoint WILLIAM WILLIAMSON of the City and County of Honolulu, Territory of Hawaii (a person of the Protestant religion), a Trustee under the said Will and of the said Estate in place of and in succession to the said Samuel M. Damon, resigned.

“IN WITNESS WHEREOF the said undersigned have hereunto set their hands and seals this 9th day of June, 1916.

“(Signed) A. G. M. ROBERTSON,
EDWARD M. WATSON,
RALPH P. QUARLES.”

The Trustees thereafter, following the procedure that had prevailed in connection with prior appointments of new trustees, petitioned the Circuit Judge at Chambers, possessing original equity jurisdiction, to confirm the appointment of Williamson and fix his bond.

The Circuit Judge, in acting upon the petition, ruled that by the Hawaiian Judiciary Act of 1892, which transferred original equity jurisdiction from the Supreme Court to the Circuit Court, the power to appoint new trustees was no longer possessed by the Justices of the Supreme Court; that the power of appointment was lost *ipso facto* with the Judiciary Act of 1892 becoming operative. On this finding the Circuit Judge proceeded to hold the appointee Williamson disqualified, and made a purported ap-

pointment of the appellant King, the decree being reversed on appeal to the Supreme Court of the Territory and the cause remanded with instructions to dismiss the petition which the Supreme Court found had been unnecessarily brought by the Trustees; that the only petition that could be entertained by the judge possessing original equity jurisdiction would be one asking for fixing and approval of Williamson's bond. In accordance with the opinion of the Supreme Court, the Circuit Judge entered a judgment and decree dismissing all of the proceedings. This decree was dated March 19, 1916, being prior to the filing by appellant King of his appeal to this Court.

JUSTICES OF THE SUPREME COURT OF HAWAII NOT DISQUALIFIED FROM HEARING APPEAL.

Among the grounds of appeal alleged by appellant in seeking a reversal in the case at bar, is one that the Supreme Court of Hawaii erred in not holding that the Justices thereof were disqualified from hearing the appeal from the Circuit Judge, at Chambers, in Equity. In support of this claim of disqualification, counsel for appellant relies upon Section 84 of the Organic Act of the Territory of Hawaii, which provides as follows:

“* * * * no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, *or in the issue of*

which the said judge or juror has, either directly or through such relative, any pecuniary interest, nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the Legislature of the Territory may add other causes of disqualification to those herein enumerated."

Pecuniary interest, direct or indirect, by the Justices of the Supreme Court of Hawaii in the issue of the case at bar must, therefore, be shown to sustain appellant's contention that the Court was disqualified from hearing and deciding the appeal. Otherwise, the section of the Organic Act relating to the disqualification of judges is wholly without application.

It will be noted that the provisions of Section 84 refer specifically to *pecuniary interest*, direct or indirect in the *issue* of the cause. In this regard the provision is to be distinguished from the wording of the statutes in several of the States, where a field for conjecture and construction is created by the use of the word "interest" alone, without qualification or limitation. Section 84 of the Organic Act, however, is clear and unequivocal in defining the nature of the interest in the *issue* that is to constitute a legal disqualification upon the part of a judge. That interest is defined as a "*pecuniary interest*" in the *issue* of the cause.

There is no possible ground for indulgence in speculation as to the legislative intent in giving effect to Section 84 of the Organic Act. It limits the disquali-

fyng effect of judicial interest to "pecuniary interest" direct or indirect in the *issue*, and as held in the decision of the Supreme Court of Hawaii, "the power of appointment delegated to a majority of the justices of this Court in any by the said provision of the Will aforesaid is a naked power without reward or pecuniary benefit to the Justices or any of them."

The statement is contained in appellant's brief that "Section 84 of the Organic Act would be just as potent if it simply made 'interest' of the judge a disqualification." It is plain, however, that the section in question would be materially more potent, if the word "interest" alone were used in the statute. That would leave a field for construction, and might be construed to include cases in which no *pecuniary* interest, directly or indirectly, was involved. Therefore the disqualifying ground under Section 84 is far narrower than would be the case were the nature of the "interest" left in doubt by a failure to limit it to "pecuniary interest," in the issue as is done in Section 84 of the Organic Act.

It seems too clear for argument that the Justices of the Supreme Court of Hawaii, who, acting as individuals, named William Williamson as a successor in trust to Samuel M. Damon, resigned, under the fourteenth provision of Mrs. Bishop's Will, possess no *pecuniary interest* whatever, direct or indirect, in the *issue* of this appeal.

In the case of *Clyma v. Kennedy et al.*, 64 Conn., at page 318, the Court says:

“The interest in a cause which of itself disqualifies a judge from acting therein, is a pecuniary one, similar to the interest which a party in a civil action has in it.”

The Court then enumerates the reasons why no disqualification existed, in language clearly applicable in the case at bar :

“He had no pecuniary interest in the subject matter of the action. It was not his own cause. He was not the moving party. He was not liable for costs, nor was it possible for him to receive anything by any judgment which might be rendered. The event of the proceeding could not bring him gain, nor subject him to any loss.”

The case of *Inhabitants of Northampton v. Smith*, 11 Met. (Mass.) 390, a decision by Chief Justice Shaw, lays down the rules as to disqualification when the statute simply uses the word “interest” without qualification or limitation to pecuniary interest, as is done in Section 84 of the Organic Act. The Court said :

“We think it is not to be a mere possible, contingent interest ; not an interest in the question or general subject, to which the matter requiring adjudication relates ; but one that is visible, demonstrable, and capable of precise proof. *Cottle, Appellant*, 5 Pick. 483. *Sigourney v. Sibley*, 21 Pick. 101, and 22 Pick. 507. It is not the bias or prejudice which would be sufficient to set aside a juror. *Davis v. Allen*, 11 Pick. 466. It is to be considered that such an interest, in the judge of probate, is not only to oust him of his jurisdiction, but is to confer jurisdiction on another court of probate, which otherwise would not have it. It must therefore depend upon

facts capable of being precisely averred and proved, and thus put in issue and tried. The importance of this consideration will be appreciated, when it is considered, that if jurisdiction is taken by a probate court, not entitled to it by law, the entire proceedings are void; the practical consequences of which may be extensively injurious. *Holyoke v. Haskins*, 5 Pick. 20. *Coffin v. Cottle*, 9 Pick. 287.

“It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy, or bias, which would disqualify a juror. *Smith v. Bradstreet*, 16 Pick. 264.

“It must be certain, and not merely possible or contingent. *Hawes v. Humphrey*, 9 Pick. 350. *Wilbraham v. County Commissioners*, 11 Pick. 322. *Danvers v. County Commissioners*, 2 Met. 185. It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as a member of a town, parish or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings.”

“It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible, or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action. It is like the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in

the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent."

The authorities cited by counsel for appellant in support of the claim of disqualification show that the courts, even in construing a statute where the broad term "interest" is used, have frequently limited it to pecuniary interest, for the reasons so clearly set forth by Chief Justice Shaw.

It has been held that signing of a petition and voting for the annexation of territory to a city will not disqualify a judge to hear and determine the question of annexation.

Foreman v. Marriana, 43 Ark. 324.

A judge's interest in a question of law involved in a case before him, due to the fact that its determination will in all probability control rights or remedies which may therefore accrue to him, is not such an interest as will disqualify him.

People v. Edmunds, 15 Barb. (N. Y.), 529.

North Bloomfield Gravel Min. Co. v. Keyser,
58 Cal. 315.

It is said in *People v. Edmunds*, *supra*,

"A judge is precluded from acting in his official capacity 'in any cause to which he is a party, or in which he is interested' but the prohibition does not extend to cases where the interest is simply some question of law involved in the controversy. The statute very properly stops short of that, as judges must often, and necessarily consider and decide questions which may be applicable to their own rights, or to their property, should they be fortunate enough to possess any."

The case at bar may be said to present a situation analogous to that which would arise if a judge appointed a guardian *ad litem* in a suit pending before him, whose disqualification should later be urged and his removal therefore requested. In that case the judge who appointed the guardian *ad litem* would certainly pass upon the question of disqualification notwithstanding that he, himself, had made the appointment. Similarly, a judge is not disqualified to pass upon the removal of a receiver or a master for cause, although such receiver or master was appointed by him.

In deciding the appeal, the Supreme Court of Hawaii was passing upon a question of law in the determination and issue of which none of the justices possessed, directly or indirectly, the slightest pecuniary interest. It follows, therefore, that no disqualification existed under Section 84 of the Organic Act upon the part of the justices of that Court who, acting as individuals, joined in naming William Williamson as a successor in trust to Samuel M. Damon under the fourteenth provision of Mrs. Bishop's Will.

CLEAR LANGUAGE OF WILL SHOWS POWER OF APPOINTMENT DELEGATED TO JUSTICES AS INDIVIDUALS, AND NOT TO SUPREME COURT AS SUCH. THEREFORE POWER OF APPOINTMENT UNAFFECTED BY TRANSFER OF EXCLUSIVE ORIGINAL EQUITY JURISDICTION TO CIRCUIT COURT.

It is submitted that there is no valid ground to support the contention of appellant that the transfer of original equity jurisdiction by the Hawaiian Judiciary Act of 1892 took with it any right or power that a majority of the justices of the Supreme Court possessed under the fourteenth clause of Mrs. Bishop's Will. By that Act original equity jurisdiction which had been exercised by the Supreme and Circuit Courts was placed exclusively in the Circuit Courts. But the Supreme Court of Hawaii, in its opinion in the case at bar, is very clear in disposing of appellant's contention that this prevented the exercise of the power of filling vacancies in the board of trustees, given by Mrs. Bishop's Will to "a majority of the justices of the Supreme Court."

The Court says:

"By constitutional and statutory provisions prior to the Judiciary Act of 1892 original jurisdiction in equity was vested in the Supreme Court and Circuit Courts. Such jurisdiction was exercised by the chief justice as chancellor, the first associate justice as vice-chancellor, and, subsequent to 1862, by the second associate justice, acting severally and not jointly, and from the decision of the chancellor, vice-chancellor or second associate justice an appeal lay to the Supreme Court *in banco*. (Constitution 1852, Art. 86; Constitution 1864, Art. 68; Compiled Laws 1884, Sections 847, 848.) After the Act of 1878 (see Compiled Laws 1884, p. 389), and prior to the Judiciary Act of 1892, the several justices of the Supreme Court sitting at Chambers, and the several Circuit Judges, exercised original equity jurisdiction. A careful examination of the decisions shows that it was the rule by constitution, statute and practice for a single justice to sit in equity matters, his decision

being subject to appeal to the Supreme Court *in banco*. To this rule, custom or practice there appears to have been only two exceptions, those in the cases of *Tucker v. Estate of Metcalf*, 3 Hawaiian Reports, 180, and *Kalakaua v. Keameamahi*, 4 Hawaiian Reports, 577, where, by agreement, the first named cause was submitted to the chancellor and Hartwell, Justice, and in the latter cause a demurrer was heard in the first instance by the full court, by consent, for the purpose of expediting the decree in the cause and making the decision on the demurrer final, analogous to reserving a question. The very fact that in these two last cases named the submission to more than one justice was by consent tends to show the departure made in these cases from the usual practice in equity matters wherein original jurisdiction in equity was exercised by a single justice sitting in equity at chambers. This practice obtained at the time the Will of the testatrix was written, had obtained for many years prior thereto, and was in force at the time the Will was probated and took effect, hence the provision of the Will under consideration must be construed as being intended to vest and as vesting in the justices of this court as individuals, and not as a court, the power of filling vacancies among the trustees. If the authority to fill such vacancies had been delegated to the police magistrate of Honolulu it would be evident that it was not in the mind of the testatrix that the particular judge or court exercising original equity jurisdiction in the other matters touching the trust should also have power to fill vacancies in the office of trustee under the Will. Inasmuch as the justices of the Supreme Court at the time the Will became effective did not act jointly or as a court *in banco* in exercising original equity jurisdiction, but acted severally, it would be extending the terms of the provision of the Will under consideration to hold that the testatrix intended by the language used that when a trustee under the Will dies or resigns the vacancy thereby

occasioned should be filled by appointment made by the particular court exercising original equity jurisdiction in other matters pertaining to the trust."

In the Matter of the Estate of Bernice Pauahi Bishop, deceased, 23 Hawaiian Reports, 575; Record, 108-119.

The Court thus shows that since the law did not permit a "majority of the Justices of the Supreme Court" to exercise original equity jurisdiction in the manner prescribed in the fourteenth clause of the Will, the reference to the official character—"a majority of the Justices of the Supreme Court"—must be regarded only as a description of the persons who were to execute the power. If the law did not permit the application of original equitable jurisdiction by a majority of the justices of the Supreme Court—and the opinion of the Supreme Court of Hawaii shows conclusively that it did not—then they, at all times, derived their authority from Mrs. Bishop's Will, and the power could in no way be affected by the transfer of original equity jurisdiction to the Circuit Court by the Judiciary Act of 1892.

It is clear from an examination of the Hawaiian Constitutions of 1864 and 1887, referred to by the Supreme Court in its opinion, that parties appearing in an original proceeding in equity were given a constitutional right of appeal, and the exercise of this right was fully provided for by legislative enactment and the rules of practice in the Supreme Court.

Article 68 of the Hawaiian Constitution of 1864 provided for the exercise of original and appellate jurisdiction in equity in the following terms:

“Article 68: The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom; he shall be *ex-officio* President of the Nobles in all cases of impeachment, unless when impeached himself; and exercise such jurisdiction in equity or other cases as the law may confer upon him; *his decisions being subject, however, to the revision of the Supreme Court on appeal.* Should the Chief Justice ever be impeached, some person specially commissioned by the King shall be President of the Court of Impeachment during such trial.”

A similar article is to be found in the Constitution of 1887.

In finding untenable the claim that the testatrix was attempting to delegate a judicial function and pointing out the clear intention of the testatrix as shown by the fourteenth clause, the Court further says:

“It is true that the testatrix in the Will could not delegate a judicial function to any court; that such functions are created by law and not by appointment of individuals. But the naked power of appointing in succession the trustees of the trust is not of itself a judicial function but a power which may be created by the grantor of a trust. If the testatrix had named the chancellor as the person to fill vacancies it might well be contended that she intended that the court exercising original equity jurisdiction should fill vacancies among the trustees under her Will, and, consequently, that when the Chief Justice ceased to be Chancellor and the powers of the Chancellor were transferred to the Circuit Judge sitting in Chambers

in Equity, that it was her intention that the latter should thereafter exercise the power of appointment. We think the conclusion is reasonable that the testatrix in naming a majority of the justices of this court intended that the individuals occupying the offices of chief justices and associate justices, or a majority of them, acting as individuals, should exercise the power of appointment, and not the Supreme Court, and that the language used is merely descriptive of the persons whom she intended to exercise the power. This conclusion is the more reasonable one when we reflect that the testatrix must have known of the changes which occur from time to time in the personnel of the justices of this court."

It is submitted that the Constitutional provisions and the rules of practice made in conformity therewith, cited in the opinion of the Supreme Court of Hawaii, quoted *supra*, show conclusively that the Supreme Court of Hawaii could at no time exercise the original equity jurisdiction conferred upon it by the Constitution through the "choice of a majority of the justices." It was when acting solely in the exercise of *appellate* jurisdiction that the Court could reach a decision by a majority ruling. To have acted in the exercise of original equity jurisdiction through a majority of the justices would have deprived a party litigant of the right of appeal in equity cases, a right provided for in the Constitutional provisions cited.

It follows, therefore, that there is no valid ground to support the contention that the transfer of original equity jurisdiction took with it any right or power that a majority of the justices of the Supreme

Court might possess under the fourteenth provision of Mrs. Bishop's Will.

The case at bar, then, presents unquestionably a situation in which a testatrix named the *majority of the justices of a judicial tribunal to exercise a power of appointment, which they could not have exercised but for the Will*. And it is precisely this situation which has been considered in decided cases and the rule established that the evident intention of the creator of the trust is that the reference to the official character of the donee of the power is to be regarded as a description of the person or persons to execute the power.

The case of *Shaw v. Paine*, 12 Allen (Mass.) 296, shows clearly the principles to be applied when the reference is to the official character of the donee, who is without jurisdiction to act as the power of appointment provided.

In that case a testator in his Will, having constituted three trustees of certain property, provided as follows:

"And whenever any vacancy shall occur in the number of my trustees, I then will and direct that there shall be nominated and appointed such trustee or trustees; and, in such case, the surviving or acting trustees for the time being shall, by an instrument or petition, nominate suitable person or persons to be appointed by the Judge of Probate for the time being such trustee or trustee in the place of the trustee or trustees dying, resigning or removing * * * and in default of such nomination and appointment I direct that a new trustee or trustees

shall in every such case be appointed by the said Judge of Probate, or by one or more of the Justices of the Supreme Court."

It was held that a new trustee nominated as provided for in the Will and appointed by the Judge of Probate, was duly appointed, although the judge gave no notice to persons interested, *since in making the appointment he did not act officially but under the Will.*

In the course of its decision the Court said:

"It is undoubtedly competent for a testator to provide by his will for the substitution of new trustees in case of a vacancy occurring among those first appointed, as much as it is in his power to create the trust. And he may do this directly by naming the persons to be substituted, or by giving a power of appointment. When the power of appointment given by the Will is duly exercised, the trustees take under the Will, and derive their powers from the testator.

"On the other hand, it is equally certain that it is not in the power of the testator to confer upon a judicial tribunal a jurisdiction which is not conferred by law. If, therefore, a testator gives by his will to a judicial officer a power of appointment which the law does not sanction, the reference to the official character must be regarded as only a description of the person who is to execute the power. The duty of making the appointment would not be binding upon him in his official capacity, so that he could be impeached for a wilful neglect or refusal to discharge it, nor, in the case of a judge of probate would an appeal lie from an improper exercise of the power. If the power were duly exercised, the trustee would derive his authority from the will, and not from the judicial act of the officer invested by the will with the appointing power."

Somewhat similar facts were present in the case of *National Webster Bank v. Elridge*, 115 Mass. 424. In that case a testator directed that a "new trustee or that new trustees shall in every such case be appointed by the said judge of probate or by one or more of said justices."

As to whether the proceedings taken in connection with the appointment of a new trustee were valid the Court said:

"Objection is made, in the first place, that the appointment of new trustees successively is invalid because no notice of the proceedings was given in the probate court. But upon such an appointment the judge of probate acts under the authority conferred upon him by the terms of the will, and not by virtue of his general authority as a court or judicial officer under the statutes establishing the court and defining its jurisdiction. *Shaw v. Paine*, 12 Allen 293. It was not a judicial proceeding and therefore required no notice."

The case of *Moore et al. v. Isbell et al.*, 40 Iowa 383, in affirming the rule as to the power of the creator of a trust to provide for the appointment of trustees in succession, also passes on the effect to be given a power of appointment delegated to a person possessing an official character. The Court said:

"It is a familiar doctrine that the grantor of a trust estate may provide, in the instrument creating it, for the succession of trustees, or the transfer of powers from persons or classes of persons named to execute the trust, to others designated to supersede or succeed them. 'The person who creates the trust may mould it into whatever form he pleases; he may

therefore determine in what manner, in what event, and upon what condition the original trustee may retire and new trustees be substituted.' Perry on Trusts, 287; Hill on Trustees, p. 176. Conditions of the character of the one in the deed of trust under which defendants claim title, providing for the appointment of a trustee to succeed the one named, are not infrequently found in instruments of this character, and, so far as we are advised, have always been held valid and the acts of the trustees appointed under them upheld. The grantor may provide in the instrument that the new trustee shall be appointed by the creditor, the *cestui que* trust, or by some officer, as judge of probate, county judge, etc., or by an individual named filling a specified office and his successors in office. If the appointment be made in the manner provided, the new trustee will thereby become clothed with all the powers conferred by the deed upon the person therein designated."

To the objection that the power was not valid because not exercised by the individual who occupied the office of county judge at the time the trust deed involved in the case was executed, the Court said:

"It is insisted that the condition of the deed of trust authorizing the 'acting county judge' to appoint a successor to the trustee named conferred that power upon the person then filling the office of county judge, the words designating the office being *descriptio personarum*. The language warrants no such conclusion. It conferred the power of appointment upon the individual who filled the office of county judge at the time the appointment should be demanded."

In the case at bar it was the obvious intention of the testatrix to place the power of appointing successors in trust in the hands of the individuals who would occupy the highest judicial offices in Hawaii.

The fourteenth clause of the Will refers solely to individuals, "a majority of the Justices of the Supreme Court." As has been shown, a majority of the Justices of the Supreme Court could at no time, in the exercise of the Court's original equity jurisdiction, act in the manner prescribed in the Will in the appointment of new trustees. In the language of *Shaw v. Paine*, supra, the duty of making the appointment under Mrs. Bishop's will would not have been binding upon a majority of the Justices of the Supreme Court in their official capacity, so that they could be impeached for a wilful neglect or refusal to discharge it.

Since the Supreme Court, at the time testatrix's Will became operative, acting in the exercise of original equity jurisdiction by *one* of the justices thereof, did possess the authority to appoint trustees, the fact that the testatrix provided for an appointment of successors in trust by a *majority* of the justices shows the intention of the testatrix to distinguish between the Supreme Court as a judicial tribunal and a majority of the individuals occupying the highest judicial offices in the country in which she desired to place the responsible power of selecting successors in trust, and thus in a most vital particular provide for the successful administration of the great charitable trust created by her.

In 39 Cyc. at page 281, entitled "Trusts," it is said, referring to the power of Courts of Equity to appoint new trustees:

“It exists and will be exercised whenever there is failure of suitable trustees to perform the trusts either from original or supervenient incapacity to act. Therefore if the author of the trust fails to name trustees or makes no provision for appointment, or if doubt exists as to the person intended, or if the one named is incompetent or otherwise incapable of executing the trust, or dies, or resigns, or is removed, or if from any other cause there is a failure of a regularly appointed trustee, Courts of Equity will take upon themselves the due execution of the trusts and, if necessary, will appoint other trustees to carry the trust into effect * * *”

None of the conditions calling for the exercise of original equity jurisdiction, as laid down in the foregoing statement of the rule, are to be found in the case at bar.

It is elementary that the creator of a trust possesses inherent power to effectuate the purpose of its creation and safeguard its continuance by setting down the manner in which successors in trust are to be chosen upon the contingency of a vacancy occurring. If the method provided contravenes no rule of positive law, it is recognized and enforced. In the case at bar, a reference to the Will identifies the donees of the power; they are willing and qualified to exercise the power given them and do exercise it. The plain intention of the testatrix is carried out and the appointment is made in the manner prescribed in the Will.

It is submitted that it has been clearly shown that under a proper construction of the fourteenth clause of Mrs. Bishop's Will the power of appointing suc-

cessors in trust resides in the Chief Justice and Justices of the Supreme Court of Hawaii as individuals or a majority of them; that since the law did not permit the exercise of original equity jurisdiction by a majority of the Justices of the Supreme Court the sole authority possessed by "a majority of the justices of the Supreme Court" to appoint trustees was derived from Mrs. Bishop's Will.

It was, therefore, not a power attaching to the Court or the justices thereof in a jurisdictional sense. The power to appoint successors in trust was an authority derived solely from the Will, and it is clear, as shown in the opinion of the Supreme Court, that the power could not be affected by changes in the matter of the exercise of original equity jurisdiction.

The case of *In re Estate of Bernice Pauahi Bishop*, 11 Haw. 33, is cited in appellant's brief and was erroneously relied upon by the trial court in reaching the finding that was subsequently reversed on appeal. The case dealt with the construction of the following language contained in the thirteenth clause of Mrs. Bishop's Will, as follows:

"I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures and of the condition of said schools to the Chief Justice of the Supreme Court, or other highest judicial officer in this country."

At the time the Will became operative and up to the time of the passage of the Judiciary Act of 1892, the Chief Justice as Chancellor did possess the au-

thority to exercise original equity jurisdiction in passing upon trustees' accounts in the manner called for by the thirteenth clause. The annual settlement of the trustees' accounts having been entertained as part of the Court's original jurisdiction in equity prior to 1892, the Court held that it passed to the Circuit Court by the terms of the Judiciary Act. The Chief Justice possessed the power, at the time Mrs. Bishop's Will became operative, to act in the settlement of trustees' accounts precisely in the manner called for by the provisions of the thirteenth clause. Therefore the reasoning of Justice Whiting that the clause could be construed as meaning "other highest judicial officer' having judicial jurisdiction over the subject matter of the same nature as this—that is, annual settlement of trustees' accounts under a will probated heretofore in the Supreme Court— and that such highest judicial officer would now be one of the Judges of the First Circuit Court."

It is clear that this reasoning has no application to the case at bar. It belongs to that class of cases cited by the appellant to the effect that when the judge of a certain court charged with the sole exercise of original jurisdiction of a particular subject, for instance, equity or probate, is vested with the power of filling vacancies among the trustees of a trust by the instrument creating the trust, that the grantor intended to vest the *court* with such power and not the *judge as an individual* who presides over such Court. As the Supreme Court of the Territory

observes, such authorities are not in point in the case at bar.

In the Matter of the Estate of Bernice Pauahi Bishop, deceased, 23 Haw. 582; Record, p. 118.

The case of *Carr v. Corning*, 73 N. H. 362, 62 Atl. 168, also cited by appellant in support of his contention, is clearly distinguishable from the case at bar for the same reasons that apply to the decision of the Supreme Court of the Territory in the matter of settling the trustees' accounts.

In *Carr v. Corning* a testator in his will provided for the filling of vacancies on the board of trustees by appointment "to be approved by the Judge of Probate for the County of Merrimack for the time being."

The probate judge took the view that the power of approval was given to him as an individual and he refused to entertain in his judicial capacity a petition for the approval of new trustees. Mandamus was brought and the question came before the Supreme Court of New Hampshire.

It was held that the judge of probate was under a duty to act exactly in the manner prescribed in the testator's will, and the Court said that it was obviously the intention of the testator to refer to the probate court as such, in his use of the common reference of "probate judge." And the controlling presumption in the mind of the Court was the fact that the law made it the duty of the probate court to act,

as the testator provided, without reference to the will.

In considering the question involved in the case the Court said :

“There is no force in the defendant’s first position. In title 25 of the Public Statutes, entitled “Courts of Probate, and Estates of Deceased Persons,” the words “judge” and “judge of probate” are constantly used when it is apparent that the probate court is intended. For example, Chapter 182, Pub. St. 1901, is entitled “Judges of Probate and their Jurisdiction.” It is a matter of common knowledge that, when a person attending to probate business or considering probate matters speaks of referring anything to the judge of probate, he usually intends the probate court, and not the person who exercises the function of that office. That is probably the sense in which Mr. Pearson used the words of the will, for the probate court has jurisdiction of wills and of the estates of deceased persons. Pub. St. 1901, 6, 182, Sec. 2. When he provided that the persons to administer the trust he was creating should be appointed by the judge of probate, there is a presumption that the probate court was intended; and the fact that the law makes it the duty of that court to approve the appointment of trustees, as will hereafter appear, makes that presumption so strong that the mere addition of the words ‘for the time being’ is not enough to rebut it.”

The presumption as to the intention of the testator as indulged in by the New Hampshire court, would not be applicable in the case at bar, for the law not only did not make it the duty of “a majority of the Justices of the Supreme Court” to appoint new trustees, but the law actually made it impossible for a majority of the Justices to act ju-

dicially in the exercise of original equity jurisdiction, as required by the fourteenth clause of Mrs. Bishop's Will.

It is submitted that this Court will regard as authoritative and controlling, as a construction of local law and practice, the decision of the Supreme Court of Hawaii that a majority of the Justices of the Supreme Court at no time possessed the power to exercise original equity jurisdiction as is called for in the appointment of new trustees. This Court has held that the construction which the Supreme Court of the territory has put upon local law is entitled to great weight.

Hawaii County v. Halawa Plantation, Limited, 239 Fed. Rep. 836.

The Supreme Court of the United States has applied a similar rule in deciding cases brought to it from the Territory.

Keahola v. Castle, 210 U. S. 149; 52 L. Ed. 998.

Cotton v. Hawaii, 211 U. S. 162; 53 L. Ed. 131.

Kapiolani Estate v. Atcherly, 21 Haw. 441;
238 U. S. 119.

John Ii Estate v. Brown, 235 U. S. 342; 59 L.
Ed. 259.

In conclusion, it is submitted that it has been shown that the Justices of the Supreme Court of Hawaii who joined in the appointment of Williamson, under the power given in Mrs. Bishop's Will, were not disqualified from hearing and determining the appeal by reason of pecuniary interest in the issue, and that the proper and reasonable construc-

tion of the fourteenth clause of the will shows that the power of appointment was reposed in the justices as individuals and therefore was unaffected by changes in the local law relating to the exercise of original equity jurisdiction.

For the foregoing reasons the decree of the Supreme Court of Hawaii should be affirmed.

Respectfully submitted,

HENRY HOLMES,

CLARENCE H. OLSON,

PAUL R. BARTLETT,

Attorneys for Appellees.

Dated, Honolulu, October 1, 1917.

United States
Circuit Court of Appeals
For the Ninth Circuit

RALPH H. CAMERON, NILES J. CAM-
ERON, B. A. CAMERON, S. P. PEPIN,
and L. L. FERRALL,
Appellants,
vs.
THE UNITED STATES OF AMERICA,
Appellee:

Brief of Appellants

Upon Appeal from the United States District Court
for the District of Arizona

ROBERT E. MORRISON,
J. E. MORRISON,
Solicitors for Appellants.



FILED
JAN 21 1918
F. B. H. G. 1018



No. 3001

*IN THE UNITED STATE CIRCUIT COURT
OF APPEALS.*

FOR THE NINTH CIRCUIT.

RALPH H. CAMERON, NILES J. CAMERON, B. A. CAM- ERON, S. D. PEPIN, and L. L. FERRALL,	Appellants,	Brief of Appellants.
vs.		
THE UNITED STATES OF AMERICA,	Appellee.	

STATEMENT OF CASE

The appellee, in its amended bill of complaint, among other things, alleges that it is the owner of certain lands situate in Coconino County, State of Arizona, the same lands as those included within the Cape Horn Lode mining claim, notice of location whereof is of record in the the office of the County Recorder of said County, in Book 4 of Mines, page 106, and as described in the patent survey thereof, No. 2023, filed in the office of the United States Surveyor General for Arizona; that said lands, with others, on February 20th, 1893, were, by proclamation of the President, pursuant to Act of Congress, approved March 3rd, 1981, (26 Stat. 1905), withdrawn and set apart as the Grand Canyon For-

est Reserve, and that said lands, ever since said February 20, 1893, have been a part of the National Forests of the United States, and are now a part and parcel of the Tusayan National Forest, established June 28th, 1910, by proclamation of the President, pursuant to the aforesaid Act of Congress, and the Act of Congress approved June 4, 1897, (30 Stat. 11). That the said lands, with the exception of a strip of about seventy-five feet in width, were, with other lands, on January 11th, 1908, further withdrawn and set aside as a part of the Grand Canyon National Monument under the Act of Congress approved June 8, 1906, (34 Stat. 225), and that said lands, ever since January 11, 1908, have been and now are, a part of the said Grand Canyon National Monument; that said Grand Canyon is an object of great scientific and scenic interest, and is visited by thousands of people each year; that the said lands constitute a very important part of said Monument as they are upon the southern rim of said Grand Canyon, enclose the head of Bright Angel Trail, the principal means of access to the bottom of said Grand Canyon, and are adjacent to the railroad terminal and the principal hotel buildings, and should be open to the free and unobstructed access, at all times, of the public, and

to the unhampered administration by the officers and agents of the appellee, for the protection and accommodation of the large numbers of persons desirous of viewing the great scenic and scientific wonders of the said Grand Canyon; that on April 10th, 1902, the defendant, Ralph H. Cameron, in pretended compliance with the mining laws of the United States, located the said lands of the appellee, as the Cape Horn Lode mining claim, and on February 23, 1904, made an amended location thereof. That on May 17th, 1905, the said Ralph H. Cameron filed his application for patent on said Cape Horn Lode mining claim, with the Register and Receiver of the United States Land Office, at Prescott, Arizona; that thereafter a protest against said application was made, and a hearing had, at which said Ralph H. Cameron appeared, and introduced evidence in support of said mining claim, and in support of his application for patent thereon; that on February 11, 1909, the Secretary of the Interior held that no discovery of mineral had been made within the boundaries of said mining claim; that the land embraced in said mining claim was not mineral in character, and the said Secretary of the Interior rejected the said application for patent, held the location of the said Cape Horn Lode

mining claim to be null and void, and held the lands therein embraced, to be a part and parcel of the said Grand Canyon National Monument; that the First Assistant Secretary of the Interior thereafter denied a motion for review of the said decision, and that the General Land Office, on April 3rd, 1912, declared the said decision to be final, and finally annulled the location of said Cape Horn Lode mining claim, and declared the lands covered thereby to be a part of the aforesaid Grand Canyon National Monument; that thereafter, the said Ralph H. Cameron filed a second application for patent on the said Cape Horn Lode mining claim, and thereafter, on August 4th, 1915, the Secretary of the Interior, by reason of the said previous decision, held that the said mining claim had no legal existence, and denied said application for patent; that the said appellant, Ralph H. Cameron, notwithstanding said decisions, has continued to assert, and does assert, the right to the exclusive use and occupancy of the aforesaid lands, thereby preventing the appellee from causing to be constructed thereon improvements greatly needed for the convenience and protection of the public desirous of viewing the said Grand Canyon; that the appellee by reason of said asserted right, and by reason

of suits instituted, threats made, and violence offered by said Ralph H. Cameron, and others of said appellants, persons holding or desirous of securing permits from appellee to occupy and use portions of the aforesaid lands for the purpose of conducting thereon enterprises for the convenience of the public, have been prevented from going upon or occupying said lands, and have been forcibly ejected therefrom and deterred from securing permits, as aforesaid; that the appellants have constructed numerous buildings on the said lands, all within the said Tusayan National Forest, and, with the exception of two of said buildings, all within the said National Monument, all of the said buildings having been constructed since the withdrawal of said lands as a part of the Grand Canyon Forest Reserve; that some of said buildings have been enlarged, and that new buildings have been erected on said lands by appellants B. A. Cameron, L. L. Ferrall and S. D. Pepin, in the years 1914 and 1915, and after the aforesaid decisions of the Department of the Interior, and that notwithstanding said decisions, the said appellants maintained, and were at the time of the filing of said complaint, maintaining the said buildings on said lands, and occupying the same

as residences, and for the purpose of conducting therein and on said lands, livery and other business enterprises; that said appellants used said lands and buildings for the conduct of livery businesses in the years 1914 and 1915, which said businesses were being conducted on an extensive scale at the time of the filing of the complaint; that the appellants had permitted to accumulate around said buildings, and at or near the rim of the said Grand Canyon, large deposits of stable manure, garbage, and other refuse, to the great annoyance and discomfort of the public, and thereby greatly detracting from the scenic beauties of the said Grand Canyon; that on September 19th, 1913, the said Ralph H. Cameron was formally offered a free special use permit authorizing the occupancy of said lands on which the said buildings are located; that said Ralph H. Cameron, on December 4th, 1913, declined to accept said permit, stating it was issued without his consent, against his wishes, and that he did not recognize the necessity of such permit; that on August 3rd, 1915, said permit was revoked; that the said Ralph H. Cameron, pretending to do the annual assessment work on said lands, had excavated, cut, tunnels and shafts in the said lands, and that he gave out and threatens that

he intends to continue said excavating and pretended mining operations, in violation of the laws and regulations governing National Monuments, thereby irreparably damaging that part of the rim of the Grand Canyon, and of the said National Monument most accessible to, and most frequented by the public; that all of the said acts and doings of the appellants were, and are, against the wishes, and without the consent of the appellee, and in violation of the rules and regulations of national forests and national monuments, in violation of law, and in disregard of the rights and duties of the appellee, thereby appropriating to appellants' private use the said lands which had been, as aforesaid, set aside as and constitute a very important part of the Grand Canyon National Monument, and which said lands should, of right, be open to the free and unobstructed access of the public, and to the unhampered administration of the proper officers of the appellee, and that said acts and doings of the appellants, amounted to a continuing trespass, a purpresture, and a public nuisance; that during the summer of 1915, a large increase in number of persons visited the said Grand Canyon, and it was necessary, in order to afford adequate conveniences, for appellee to issue a large number of

permits authorizing the conduct of livery businesses within said National Monument, and to put into effect a closer supervision over, and regulation of, such livery and other businesses, conducted within said National Monument, and over and of said National Monument, and that the acts and doings of the appellants, complained of, and their interference, greatly hampered the appellee in such additional supervision and regulation; that appellee had no plain, adequate and speedy remedy at law;

The appellee, in said complaint, prayed a temporary injunction, restraining the appellants from occupying, using, or asserting any claim or right to the occupancy, use or possession of the said lands and the said mining claim, and from interfering with the administration and use of said lands by the appellee, and its permittees, or the public, and from making further excavations on the said lands, which said application for temporary injunction, was denied; the appellee in the said complaint further prayed that said temporary injunction be made permanent; that appellants be ordered to remove all buildings and structures, and all deposits of filth and refuse, and to place said lands as nearly as possible in their natural condition, and that it recover its costs, and

for other and further relief ; said bill of complaint was verified; (pp. 1-13, T. of R.).

Thereupon the appellants interposed a motion to dismiss said amended bill of complaint, for the reason that the same, and the allegations therein contained, did not constitute any ground for equitable relief, and for the further reason that the matter attempted to be litigated, was the right of possession of the said lands, and the recovery of such possession could only be litigated in an action at law, and, thereupon, appellants interposed a motion to transfer said suit to the law side of the court, in the event that said motion to dismiss should be denied, (pp. 30-31, T. of R.); that thereafter the said motion to dismiss was overruled, and exception taken by appellant, and, the motion to transfer to the law side of the calendar was overruled, and exception of appellants duly made and noted, ((p. 32-33, T. of R.); and thereupon the appellants filed their answer to the said amended bill of complaint denying, under oath, that the appellee was the owner of said lands, alleging that appellant Ralph H. Cameron, made a due, lawful, valid location, under the mining laws of the United States, of the said Cape Horn Mining claim, on April 10th, 1902, and that ever since said date, said lands were, and at the time

of the filing of the said answer, were, the property of and belonged to the said Ralph H. Cameron, by virtue of said valid mining locations, and, therefore, that said lands never became a part of the said Tusayan National Forest, or of the said National Monument, although the said lands were a part of the said Grand Canyon Forest Reserve; alleging that the proclamation of the President pretending to establish the said National Monument, was without authority of law, as said Grand Canyon is of no scientific interest, is not an historic land mark or prehistoric structure, or an object of historic or scientific interest in the sense intended by Congress in the meaning of said Act of Congress of June 8, 1906, but is merely an enormous canyon, two hundred miles in length, eleven to fourteen miles in width, and approximately one mile in depth. That said pretended National Monument is approximately sixty miles long, and approximately thirty miles in width, and is unnecessary for the care and management of the Grand Canyon, and that the limits of said pretended National Monument are not confined to the smallest area compatible with the proper care and management of the Canyon, and that, therefore, the pretended withdrawal of said lands, or within a National Monument, is void,

and does not affect the lands in question; admit that the lands in question are those described in the amended bill of complaint; deny that said lands should be free and unobstructed to access by the public and to the administration of the appellee, because said lands belong to said Ralph H. Cameron, and said public, and officers of appellee, have no right thereon, except by the permission of said Ralph H. Cameron; allege that said Ralph H. Cameron has always permitted all persons desiring to observe the Grand Canyon, at all times, free and without inconvenience, charge or obstruction, whatsoever, to come upon said lands; admit that the said Ralph H. Cameron located the said ground as the Cape Horn mining claim, and allege that said location was a good, valid and lawful location, on said April 10, 1902, said Cameron having, at that time, fully complied with all the lawful requirements relating to the valid location of lode mining claims, and had performed the lawful assessment work each year after such location, to and including the year 1915, during each of said years, in the doing of said assessment work, making good and sufficient discoveries of mineral bearing rock in lodes and place, any of which said discoveries were sufficient to sustain the said location from the

date of such discoveries; admit that said Cameron filed application for patent, that protest was made, that hearing was had at which said Ralph H. Cameron appeared and introduced evidence to sustain his application, but deny that he ever introduced any evidence to sustain his location for mining claim, the sole matter at issue being whether or not the Land Department would grant his application for patent; admit that the Secretary of the Interior made a pretended and unauthorized holding that the "land was not mineral in character" wholly immaterial to the matter at issue; admit that the Secretary of the Interior rejected said application for patent, and attempted to hold said mining claim null and void, and also attempted to hold the said lands a part of the said National Monument, but allege that the actions of the said Secretary in attempting to hold said mining claim null and void was, itself, void, null and of no effect, as was his action in attempting to hold the lands a part of the National Monument, as the said Secretary had no power, jurisdiction or right, to hold said mining claim null and void, nor had the Department of the Interior, or any of its officers or bureaus any such power, jurisdiction or right, because neither said Secretary nor Department possess any functions to

cancel, or hold null and void, any mining claim location, as such question is a judicial one and not determinable by said Secretary or Department, and for the further reason, that the validity of the said mining claim and location, was not before the said Department nor the said Secretary, as the sole question presented by the application for patent, or otherwise, was whether a patent should, or should not, issue, and for the further reason that the question of whether or not a mining location is valid, is a judicial one, of and concerning the title to real estate, and, therefore, can only be litigated and determined in a court of law, before a lawful jury, if demanded; that the said pretended holding of the said Secretary, was an attempt to take the property, i. e., the mining claim or location, from the said Ralph H. Cameron, without due, or any, process of law, and to deprive him of his constitutional right to the trial of the said title by a jury, and for the further reason that the said pretended holding was based upon a finding that the "Land is non-mineral in character", which is not a valid ground for holding a mining claim or location void, because it is immaterial whether the *land* is non-mineral in character, as it is the mineral deposit which is the subject of location under the mining laws, and

for the further reason that the evidence before the Secretary overwhelmingly proved that there had been sufficient discovery of mineral bearing rock in place, on said grounds, prior to said location, and at numerous dates thereafter prior to the establishment of said National Monument, to sustain the validity of the said location, even if not sufficient, in the view of the Secretary, to justify the issuance of a patent; and for the further reason that the Secretary made no finding of fact which was a lawful reason to hold a mining claim or location null and void, even had he both the power and jurisdiction so to hold; allege that all of the said Secretary's actions were, therefore, null and void; admit that said Ralph H. Cameron continued to assert that he had the right to the exclusive use and occupancy of said lands, because he was the owner thereof under said mining location and claim; denies that the assertion of said right prevented the appellee from constructing improvements thereon; alleges that neither the appellee, nor any of its agents, ever attempted to place any improvements thereon, which would have been unnecessary, as the said Ralph H. Cameron had long since placed all such improvements as are mentioned in the amended complaint, upon said ground, permitting them

and the said grounds, to be freely used by any persons desiring to view the said Canyon; deny any threats of violence, or that anyone was ever prevented from going upon said land; deny ever having forcibly ejected anyone from said ground, or deterred anyone from securing permits from the appellee; admit the institution of one suit in the Superior Court of Coconino County, Arizona, to maintain and protect his title; admit that appellants have occupied the buildings in said complaint described; deny that any amount of manure, or other refuse, was allowed to accumulate on said ground; allege that the premises were always kept in a clean and sanitary manner; admit that said Ralph H. Cameron excavated cuts, tunnels and shafts upon the said ground in said Cape Horn mining claim in the doing of his annual assessment work thereon, and that he intended continuing so doing for the purpose of maintaining his title to said mining claim location; denies that such work in any way damages the rim of the Grand Canyon; denies that his said work, or any actions on his part complained of, are in violation of any rules or regulations whatsoever, of the appellee, as the same cannot apply to the said lands, the same being the private, individual property of appellant, Ralph H. Cam-

eron, under his said mining claim and location, and deny that the appellants, or any of them, have done any act whatsoever, nor could they have done any acts whatsoever, upon the said ground in question, amounting to a continuing trespass, purpresture, and public nuisance, as the said lands do not belong to said appellee, but are the private individual property of the said Ralph H. Cameron; allege that all of the appellants assert that said Ralph H. Cameron, since the location of said mining claim, has been in the actual, physical possession, of said land, under title claim of title, color of title, and claim of right, by virtue of said mining claim and location, and that the appellants, other than said Ralph H. Cameron, claim no right, title or interest whatsoever in said lands, and ask that said complaint be dismissed as to them; allege that permit was offered to said Ralph H. Cameron, as set forth in said complaint, and that he refused the same because there was no necessity therefor, and allege that it would have been an idle and dangerous action for him to have accepted such permit to occupy and use his own land; deny that there was a large increase in number of persons visiting the Canyon in 1915, and that it was necessary for the appellee to issue and keep in effect such a large number of per-

inits, and to put into effect closer supervision, as alleged in said complaint, and deny that the acts of the appellants have, in any way, hampered, or were hampering, the appellee in such additional supervision and regulation, and deny that appellants ever interfered with the administration of any land belonging to the appellee, and deny all allegations in said complaint, except those specifically admitted. Appellants prayed that said complaint be dismissed, and that they go hence without day.

And for a further separate defense, the appellant, Ralph H. Cameron, asserted that he had lawfully located the grounds in question by virtue of said Cape Horn mining claim, had made lawful discovery, prior and subsequent to said location, had done the annual assessment work down to and including the year 1915, and had complied with the laws, Federal, Territorial and State, in relation to mining claims, in every particular; that the appellant claimed some right adverse to his title in said lands, and prayed that the question be adjudicated, and that he be declared the owner of, and entitled to possession of the said ground, by virtue of said mining claim, and that the appellee be debarred from claiming any right therein adverse to him; to

which said separate defense, the appellee never interposed any defense or plea whatsoever, upon the trial of the case the appellee offered in evidence certified copies of the said applications for patent, and various rulings and decisions of the Secretary and General Land Office, to the introduction of which appellants objected on the ground that they did not, in any way, affect any of the issues in the case, and that the Secretary of the Interior had no jurisdiction or power to cancel the location of the Cape Horn mining claim, which objections were by the Court overruled, and exceptions duly taken by appellants, (p. 36, and pp. 83-85, T. of R.). The appellants, under stipulation of counsel, as to the manner and form of the evidence, offered, to sustain the allegations of their answer, the statement of evidence excluded by the court (p. 54-82, T. of R.), to which the appellee objected on the ground that the Court was bound and concluded by the decisions of the Secretary of the Interior annulling the Cape Horn mining claim, and that the court could not permit the introduction of any evidence on the part of the appellants for that reason, which objection was sustained, and the appellants duly excepted to the ruling of the Court,

(p. 54 T. of R.). Thereupon the Court made and entered its decree, (pp. 39-42 T. of R.) in favor of the appellee enjoining the appellants from occupying, using or asserting any claim to the lands in question; from making any excavation whatsoever in said lands, requiring them to remove all deposits of filth, manure and refuse and the said buildings and structures. Appeal was properly taken by appellants to this court, and supersedeas issued.

The questions involved are the following:

1. Does the Secretary of the Interior possess any right, authority, function, or power, to cancel, annul or hold void, a lode mining location and claim, and are not his decisions attempting so to do, above referred to, null and void?

2. Did the Secretary of the Interior make any finding of fact which is a valid, lawful ground for holding a mining location null and void, even had he the power so to do?

3. Did the trial court not commit error in refusing to admit in evidence the statement of evidence excluded (p. 54-82 T. of R.)?

4. Did the trial court not commit error in failing to pass upon the second defense of appellants, and enter judgment in accordance therewith?

SPECIFICATION OF ERRORS

I.

That the United States District Court for the District of Arizona erred in over-ruling the motion to dismiss, interposed by the appellants to the complaint filed in this cause, for the reason that the allegations, in said complaint contained, do not state or allege facts sufficient to constitute a cause of action in equity against the appellants, or either of them, or to constitute sufficient grounds in equity for the relief prayed for in the said complaint, as it appears upon the face of said complaint that the Secretary of the Interior, without any power or authority of law whatsoever, and possessing no function so to do, assumed to make certain pretended findings, judgments, orders, and decisions, purporting to cancel and annul a mining location, to wit, the Cape Horn Mining Claim, fully described in the answer of appellants; and further, attempting to restore the land embraced within the boundaries of said mining location to the public domain, and to make it a part of the Tusayan National Forest.

II.

That the said United States District Court erred in admitting in evidence, over the objec-

tion of the appellants, the certified copies of the opinions, decisions, orders, and adjudications of the Secretary of the Interior of the United States, which purported to cancel and annul the locations of the Cape Horn mining claim, fully described in the bill of complaint and answer herein, and attempting to restore the land embraced within the boundaries of the said Cape Horn Mining Claim to the public domain; and in holding and declaring said ground to be a part of the Tusayan National Forest, for the reason that the said Secretary of the Interior had no right, authority, or jurisdiction whatsoever, and possessed no function to annul or cancel the mining location, and particularly not the mining location known as the Cape Horn Mining Claim.

III.

That the Court erred in refusing the offer of the appellants to introduce the testimony of R. H. Hetherington, Ralph H. Cameron, S. D. Pepin, and Leo Kruskop, for the reason that the said testimony of the said witnesses would have tended to establish the validity of the said Cape Horn mining location, as will fully appear from the transcript of said evidence submitted to the United States Circuit Court of Appeals for the 9th Circuit, on this appeal.

IV.

That the said United States District Court erred in rendering, making, and entering its final decree in this case, for the reason that the said decree is contrary to the law, particularly as the said decree is based in part (and practically entirely) upon the said decisions, findings, rulings, and orders of the said Secretary of the Interior, which were and are absolutely void and of no effect, the said Secretary of the Interior possessing no right, authority, power, jurisdiction, or function to make any such decisions, findings, rulings, and orders.

V.

That the said United States District Court erred in rendering, making, and entering its decree in this cause, because the same is contrary to the facts, which show, demonstrate, and prove that the said Cape Horn Mining Claim, from the date of its location to and including the date of the said decree, was and is a valid mining location.

VI.

That the said United States District Court erred in over-ruling appellants' motion for a

new trial, for the reasons, set forth in each and all of the foregoing assignments.

ARGUMENT

First: Under this heading we combine the first, second, fourth and sixth specifications of error, as each of them involve the question of whether the Secretary of the Interior, the Department of the Interior, or any of its bureaus or officers, have jurisdiction and power to cancel and declare null and void, the location of a mining claim, when the owner thereof has made application for patent to the same.

It is the contention of appellants that any such action on the part of said Secretary, said Department of interior, or any of its bureaus or offices, or on the part of the Commissioner of the General Land Office, is wholly without authority, jurisdiction or power, and is therefore null and void, as such officers, departments and bureaus possess no function to cancel the location of a lode mining claim, the question involved being one of title to real estate, a judicial question, not determinable by any such officer, department or bureau, but which can only be litigated in the courts of the land.

It will be conceded that after the location of a mining claim there are two titles, one the title by possession acquired by the locator under his location, the other the fee simple title resting in the Government.

The title by possession is a granted, established and vested right, and gives to the locator or owner of an unpatented mining claim, without there being any necessity for any application of any kind to the government, the absolute power to sell, mortgage, or will the property, to extract from the mining claim, and dispose of the same, any and all kinds of mineral wealth which it may contain, independent of governmental supervision or control.

This title is of such a substantial character that the owner of such a mining claim is not required by law at any time to go into the United States Land Office or any other Department for any purpose connected therewith.

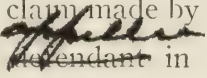
It would be burdening the Court to cite any authorities in support of the above proposition, as we do not think there are any cases in opposition to the principles above invoked.

In the decision in *Ex Parte Nichols and Smith*, which was rendered by A. A. Jones, Assis-

tant Secretary of the Interior, on the 24th day of October, 1913, it is held that the Land Department has no jurisdiction or power to declare null and void a location, upon the ground that there has been no discovery of mineral upon the land claimed as an unpatented mining claim, and in his opinion Secretary Jones says that the decision in the Yard case 38 L. D. 50, is "entirely indefensible whether viewed from an administrative or legal standpoint."

This position is also sustained in a recent decision of Judge Anderson in the Supreme Court for the District of Columbia, in Cameron vs. the Secretary of the Interior and Commissioner of the General Land Office.

In both of these cases, however, no application had been made to the Land Office for acquiring the fee simple title of the government.

In the case at bar, application was made by Cameron for patent to the Cape Horn claim, and in addition to rejecting the application the Land Office went a step further and by its decision cancelled and held void the location of this mining claim made by Cameron; and it is claimed by the ~~defendant~~  in this case and counsel for the government that because of this application

for patent, the applicant submitted himself to the jurisdiction of the Land Department for all purposes, and that the declaration of cancellation of the mining claim is binding upon him, and he cannot now and in this case question the jurisdiction and power of that department to cancel his location.

The contention of the appellant is that the Land Department or Secretary of the Interior had authority to grant or reject the application for patent, but neither had any authority whatsoever to destroy or in any way interfere with the separate, distinct, and independent title already held by the locator under his location, or to determine whether or not the locator had performed the acts necessary to constitute a valid location. A title being claimed in good faith, the courts, and not the Secretary or Land Department, have the exclusive right, power and jurisdiction to determine whether such title exists or not.

Upon discovery (as defined by the Courts wherein the amount or value is considered immaterial) and performing of all the acts of location required by law, a complete possessory title vests in the locator; "when these requirements have been complied with, the land is no longer Public, but the possession, the right to

possession, and the right to acquire the title are IRREVOCABLY VESTED in the locator.”

Erwin v. Parego 93 Fed. 608

It has yet to be claimed that the Land Department is a Court. Only Courts have power to try title and to try any question as to whether title exists or not, or for that matter rights of possession to mineral ground or otherwise.

The extraordinary proposition is here advanced that the grantor, or one who is claimed to be the grantor of title, may himself decide the question whether he has granted the title or not.

When Cameron applied for patent to the ground in dispute, he submitted his claim to the jurisdiction of the Land Office solely to have the question determined whether such patent should issue to him or not; that was the only issue which was presented for determination. He did not by such action submit to the Department the question whether he had title by possession under his location, and as has been heretofore stated that department has no jurisdiction or function which empowers it to decide the question of title under the location made by Cameron.

When the department by its decision rejected

Cameron's application for patent it exhausted its power.

No Court, much less a Department of the Government, can render judgment in any case which is not based upon the issue presented by the pleadings and papers therein. Such a judgment has no force or effect.

The order of cancellation made by the Land Office and affirmed by the Secretary in Cameron's application for patent, is based upon the question whether the land is mineral or non-mineral, and whether a discovery under the rules and regulations of the Land Department had been made.

It is well known that when an application is made for patent the Land Department requires its regulations relating to the mineral character of the land to be complied with, that is the applicant must convince the Department that the ground for which patent is asked contains mineral of commercial character, that it is of such a nature that it will justify a reasonable person in the expenditure of money in developing the same. In other words, the rule of the Department is that at the time when the application is made the ground must be developed to such an extent as to show practically that it is a paying

proposition; and we have no quarrel with this rule so long as it is held applicable only to the allowance or rejection of patent. It is within the rules of reason that the government, through its Land Department may lay down such regulations as it may deem wise and proper and require proof thereunder before permitting the fee simple title to be passed out of the government. But when this Department attempts to make its rule with reference to discovery applicable to such an extent as to go into another field of investigation, to-wit: to determine the title to the location of the claim itself, then it has stepped beyond its rightful domain of activity, for the reason that in determining the question whether a discovery of mineral has been made under a location notice another rule, than that of the Land Department in determining whether the patent should issue or not, has been established clearly and distinctly by the Courts.

A discovery upon which the Land Department might rightfully refuse to issue a patent may nevertheless be absolutely sufficient to sustain the location. The rule with reference to the discovery of mineral as laid down by the Courts is as follows: "When the locator finds rock in place containing mineral he has made a

discovery within the meaning of the statute, whether the earth or rock is RICH OR POOR, whether it assays HIGH OR LOW."

Book v. Justice Co.
58 Fed 106-120.

Reference is made to the general law and Court rulings on this subject as found in

Article III Lindley on Mines 3d Ed. Par. 335 et seq.

This learned author there discusses this question at length and in all of its phases, rulings of the Land Department, as well as of the Court.

On page 768, Lindley on Mines, 3d Ed., he says:

"TO HOLD THAT, IN ORDER TO CONSTITUTE A DISCOVERY, as the BASIS of the LOCATION, it must be demonstrated that the discovered deposit will when worked, YIELD A PROFIT, or that the LANDS containing it are, IN THE CONDITION in which they are discovered, MORE VALUABLE FOR MINING than for any other purpose, would be to DEFEAT THE OBJECT AND POLICY OF THE LAW."

Also at the same place:

"It may subsequently appear that the lands

are not of the quality which would JUSTIFY THE ISSUANCE OF A PATENT but THIS would not determine the VALIDITY OF THE LOCATION. A TECHNICAL DISCOVERY does not of itself establish the PATENTABLE mineral character of the land but is sufficient to SANCTION A RIGHT OF POSSESSION under the mining laws."

See also Page 769, Lindley on Mines:

NO COURT HAS EVER HELD that in order to entitle one to LOCATE A MINING CLAIM ore of COMMERCIAL VALUE, in either quantity or quality must first be discovered. SUCH A THEORY WOULD MAKE MOST MINING CLAIMS IMPOSSIBLE."

The attempt of the Land Department to cancel Cameron's Location was an effort to take his POSSESSORY TITLE without due or any process of law whatever, and as it is a title the Land Department cannot adjudicate concerning it at all.

The holding as to the discovery by the Secretary on Cameron's application for patent:

"Logically carried out would prohibit a miner from making any valid location until he had fully demonstrated that the vein or lode of quartz or other rock in place bearing gold or silver which

he had discovered, would pay all the expenses of removing, extracting, crushing and reducing the ore and leave a profit to the owner. If this view should be sustained it would lead to ABSURD, INJURIOUS and UNJUST RESULTS."

Lindley on Mines (2) pp. 769-70 (3rd Ed.)

Book vs. Justice M. Co.

Judge Hazley) 58 Fed. 106

Bonner vs. Meikle, 82 Fed. 697-703

If it had been the intention of the Federal Mining law that the Land Department should have the jurisdictional right to pass upon the possessory title to a mining claim, is it not a little extraordinary that when upon an application for patent an adverse is filed the Federal law requires the person adversing, within the statutory time, to bring suit against the applicant for patent in a COURT of competent jurisdiction to determine the right of possession, the right to the possessory title as between these parties. We submit that this Federal direction is of significant importance in considering the question here involved, and to our minds is of a convincing character and illustrative of our position that when the possessory title is in question the right thereto can be determined only in the Courts. We can not conceive of any principle of law

which would change the necessity for rival claimants being compelled to go to the courts to have the question of possessory title determined, and the situation which has arisen herein between the government itself and the applicant for patent as to this same possessory title. It is the same identical question which is involved in either of the cases. The only difference is as to one of the parties to the controversy being the government, and it does not strike us as being sufficient reason to change the forum for the determination of this right to title by possession that the government takes issue with the applicant Cameron. We insist that the rule should be the same in one case as in the other. If there is any difference, the reason for the determination of the question by the Courts is stronger in a case where the government is one of the parties to the litigation.

Right here permit us to suggest that jurisdiction cannot be conferred by the consent of the litigants and the mere fact that the owner of a mining claim makes application to the Land Office for patent cannot possibly enlarge the power of the Land Office, or the Interior Department, or give to it any jurisdiction or authority not conferred by statute.

We therefore contend that there are no court decisions upon the question which is presented to this Court, and we are not familiar with any Federal law or any rule or regulation of the Land Department even, which can be called to support the government in its position that the Land Department has jurisdiction to hear and determine the question of the validity of a mining location even in a case where an application for patent has been made.

We might remind the Court that departments have no powers that are not conferred on them by law, other than such as are necessary to enable them to execute the powers designated by the statute.

The Federal statutes contain no provision authorizing the Department of the Interior to cancel the location of a mining claim. It is only in connection with the granting or rejection of applications for patent that the statute brings mining locations within the purview of the Interior Department, and the right to cancel a location is in nowise essential or in any manner a part of the power to reject an application for patent. The conclusion appears to be that there is no theory upon which the Department has authority to cancel a mining location.

We think, therefore, that your honor will agree with us that the decision of the U. S. Land Office, affirmed by the Secretary of the Interior, holding that the said Cape Horn mining claim is null and void should not be admitted in evidence.

Before leaving this subject we wish to suggest the following language from Section 2325 R S U S: "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be ASSUMED THAT THE APPLICANT IS ENTITLED TO A PATENT, upon the payment to the proper officer of five dollars per acre, * * *".

Does this not mean that when no adverse is filed to an application for patent, the activities of the Land Department are confined to questions affecting the regularity of the proceedings in the application for patent.

Second: The Secretary in finding that the *land* is non-mineral in character, reached a conclusion which is one of law and not of fact, and therefore not binding upon the Court, and which is not a ground, and could not be a ground for declaring a mining location void, for the reason that it is provided by Section 2319, of the Revised Statutes of the United States, that all valuable mineral *deposits* are declared to be free and

open to exploration purposes, and the lands in which they are found, to *occupation* and purchase. Therefore, whether the lands were non-mineral or not, is entirely immaterial. The attempted finding of the Secretary, also a conclusion of law, and not a finding of fact, concerning the discovery of mineral bearing rock on said claim, while sufficient to permit him, in his discretion, to reject the application for patent, is entirely insufficient to constitute such a lack of discovery as would invalidate the location itself of a mining claim. The difference between the Department rule on discovery, and the unquestioned rule of the courts, is fully discussed in the argument under the first heading hereof.

Third: The trial court was in error in refusing to admit in evidence the statement of evidence excluded (pp. 54-82, T. of R.) the objection to the same being solely that the Court was bound and concluded by the decisions of the Secretary annulling the said Cape Horn mining claim, and that the court could not permit the introduction of any evidence on the part of the defendant for that reason. While it will, of course, be conceded that the findings of fact of the Secretary, lawfully made, in a matter before him over which he has power, jurisdiction and

authority, are final, nevertheless, as before stated, the two findings upon which he based his decision, i. e., that the land was non-mineral in character, and that no sufficient discovery had been made, were conclusions of law, as they involved the construction and application of United States Mining Laws, and were made in a matter over which the Secretary had no power or jurisdiction, the said Secretary having no function to cancel a mining location, and, therefore, the said decisions were not final and binding upon the trial court.

Fourth: The second defense of appellants was, in effect, a crossbill against the appellee, asking that the title of Ralph H. Cameron be adjudicated, and that he be decreed to be the owner of the mining claim in question, and the lands embraced within its boundaries. No answer or pleading of any kind, whatsoever, was ever made by the appellee thereto, and judgment and decree should have been entered in favor of the appellant, Ralph H. Cameron, thereon, the trial court did not, in any way, mentioning or disposing of said second defense in its said decree, or at all. The attention of the court is earnestly directed to the statement of evidence excluded, (pp. 54-82, T. of R.), which would have absolutely

proven all of the allegations of said second defense, had the trial court received the same in evidence, thus requiring a decree for appellant, Ralph H. Cameron, upon the said second defense, the allegations of which are confessed by the appellee by its failure to deny the same.

The appellants therefore submit that the decree of the lower court should be reversed, and that judgment and decree should be entered in this court, upon said second defense, that said Ralph H. Cameron, appellant, is the owner of the said Cape Horn Lode mining claim, and all of the lodes, mineral deposits, and lands within its boundaries, and that the appellee be debarred from ever asserting any title thereto adverse to the appellant, Ralph H. Cameron.

ROBT. E. MORRISON,
J. E. MORRISON,
Solicitors for Appellant.

No. 3001

IN THE
United States Circuit Court of Appeals
FOR THE
Ninth Circuit

RALPH H. CAMERON, NILES J. CAMERON,
B. A. CAMERON, S. D. PEPIN, and L. L.
FERRALL,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF ARIZONA.

THOMAS A. FLYNN, **FEB 2 - 1908**
United States Attorney.

J. O. SETH,
Special Assistant to United
States Attorney.

MORTON M. CHENEY,
Assistant to Solicitor, De-
partment of Agriculture.

No. 3001

IN THE

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RALPH H. CAMERON, NILES
J. CAMERON, B. A. CAM-
ERON, S. P. PEPIN, and L. L.
FERRALL,

Appellants,

vs.

THE UNITED STATES OF
AMERICA,

Appellee.

BRIEF
OF
APPELLEE

STATEMENT OF CASE.

The appellants' statement of facts is in the main a correct narrative, but it is deemed advisable, in order that the issues may be truly presented to supplement it, as follows:

When on May 17, 1905, the appellant, Ralph H. Cameron, filed his application for patent on the Cape Horn Lode mining claim, involved herein, with the Register and Receiver of the United States Land Office at Prescott, and after protest against said application was made and hearing had, at which said Ralph H. Cameron appeared and introduced evidence in support of said mining claim on location and in support of his application for patent, the Secretary

of the Interior, it should be stated, **gave full consideration to the evidence taken at the aforesaid hearing**, and thereupon held on February 11, 1909, as stated by the appellants that no discovery of mineral had been made within the boundaries of said alleged Cape Horn Lode mining claim, and that the land embraced in the said Cape Horn Lode mining claim was not mineral in character, and the said Secretary of the Interior rejected the said application for patent and held the location of the Cape Horn Lode mining claim to be null and void, and held the lands therein embraced to be a part and parcel of the Grand Canyon National Monument.

On September 19, 1913, the said Ralph H. Cameron was, under authority vested in the Secretary of Agriculture, by the act of June 4, 1897, (30 Stat. 1911) formally offered a free special use permit, authorizing the occupancy of that part of the said land to the plaintiff on which the buildings maintained by the said defendants on the said alleged Cape Horn Lode mining claim are located, and said permit was **specifically offered subject to the rules and regulations prescribed by the Secretary of Agriculture for the occupancy of National forests**, which said permit was, as stated by the appellants, declined by the said Ralph H. Cameron.

The statement on Page 14, brief of the appellants, that the evidence before the Secretary of the Interior in the hearing held at the protest against the

issuance of patent, pursuant to the aforesaid application for patent, filed by said Ralph H. Cameron:

“Overwhelmingly proved that there had been sufficient discovery of mineral bearing rock in place, on said grounds, prior to said location, and at numerous dates thereafter prior to the establishment of said National Manument, to sustain the validity of the said location”

is not supported by the answer, and the Secretary of the Interior, after full consideration of the evidence, did actually find on the evidence submitted that no discovery had been made sufficient to sustain the validity or existence of the said location.

While the appellant, R. H. Cameron, denies that, at the said hearing, on which the cancellation of the location was based “he ever introduced any evidence to sustain his location for mining claims,” (appellants’ brief, page 2) evidence on this point and going directly into the character of the land, and the fact of discovery, was so submitted by him, as shown by the appellee’s Exhibit “D,” which is a certified copy of the decision of the Secretary of the Interior, dated February 11, 1909, (Page 139, T of R.), and said decision states (Page 139, T. of R.), that the character of the land, applicant’s good faith and his compliance with the law, each were fully gone into by both parties in their evidence, and the testimony as reviewed and restated by the Secretary in his decision shows that the facts needed by the Depart-

ment to properly determine the validity of a mineral location were in fact submitted.

The statement on page 14 of the brief of the appellants that the Secretary in said decision

“Made no finding of fact, which was a lawful reason to hold a mining claim or location null and void”

is controverted, since Exhibit “D” of the appellee, previously referred to, shows that definite findings of fact were made by the Secretary of the Interior, and the question whether the reasons were lawful, is a matter of law and not of fact.

THE DEPARTMENT OF THE INTERIOR HAS JURISDICTION TO DETERMINE THE VALIDITY OF A MINERAL LOCATION, AND ON EVIDENCE SUBMITTED, TO CANCEL AND DECLARE NULL AND VOID ANY LOCATION NOT MEETING THE REQUIREMENTS OF THE LAW.

In pursuance of authority expressly granted by Article 4, Section 3 of the Constitution, Congress has created the Land Department a quasi-judicial tribunal and vested it with authority to hear and determine claims to the public lands asserted under acts of Congress. U. S. Revised Statutes, Secs. 441, 453, and 2478.

Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * Second. The public lands, including mines.

Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands and also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government.

Sec. 2478. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution by appropriate regulations, every part of the provisions of this Title (Title XXXII, The Public Lands) not otherwise especially provided for.

These statutes vest in the officers of the Land Department, the Secretary of the Interior and the Commissioner of the General Land Office, complete and absolute supervision, control, administration and authority over all public lands of the United States in every respect not otherwise specifically provided by law. In the exercise of these functions the Secretary of the Interior and the Commissioner of the General Land Office act administratively and judicially. The Congress of the United States, in en-

acting these statutes, wisely recognized the need for a competent governmental authority, freed from the restrictions and procedure of ordinary courts of law, possessing administrative powers for the management of the public lands, but at the same time authorized to determine those special questions of law within its peculiar province, and established the Department of the Interior as a special tribunal, which, while resorting to the courts for the execution of its decrees, should pass on all questions of land title arising in connection with the disposition of the public lands, as between the United States and the claimants under its grants. The contention of the appellants that the Secretary of the Interior was without power and authority to determine the validity of a mineral location, denies this quasi-judicial function of the Department of the Interior because it is not in name, as well as in prerogative, a court; it is contended that this is a false conception of the character and duties of the Land Department.

“Congress has constituted the land department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.” *Riverside Oil Company v. Hitchcock*, 190 U. S., 316, 324, 47 L. Ed., 1074, 1078.

“The land department of the United

States is a quasi-judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, . . . ”James et al. v. Germania Iron Co., 107 Fed., 597, 600.

“The phrase ‘under the direction of the Secretary of the Interior,’ as used in these sections of the statutes is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the Land Department of which he is the head. It means that in the important matters relating to the sale and disposition of the public domain, the surveying of private land claims and the issuing of patents thereon, and the administration of the trusts devolving upon the government, by reason of the laws of Congress or under treaty stipulations, respecting the public domain, the Secretary of the Interior is the supervising agent of the government to do justice to all claimants and preserve the rights of the people of the United States.” Knight v. Land Association, 142 U. S. 161, 177; 35 L. Ed. 974, 980.

Under this delegation of authority, vested in the Interior Department, and recognized by the courts in the cases cited, the Land Department finds complete jurisdiction over claims to the public lands in

the absence of some specific provision to the contrary.

Warnekros v. Cowan, 13 Ariz. 42, 108
Pac. 238;

Cosmos Co. v. Gray Eagle Oil Co., 190
U. S., 301, 309;

Bishop of Nesqually v. Gibbon, 158
U. S. 155, 167;

Burke v. S. P. Ry., 234 U. S. 669, 684.

It is submitted that with no statutes cited or available, depriving the Land Department of jurisdiction over mineral locations, the Secretary of the Interior has full power and authority to consider the facts in connection with the application for patent and a claim of mineral location, to reject application for patent and find the location invalid and cancel the location.

It is conceded that where the prerequisites have been met and a valid location of a mining claim is established, two titles exist, and that in addition to the fee simple title resting in the Government, the locator acquires a possessory right, subject, as stated in the brief of the appellants (page 24), to the "power to sell, mortgage, or will" and to use the claim consistent with the purposes for which the location was made. We therefore have no quarrel with the case (*Erwin v. Perego* 93 Fed. 608) cited on page 26 of the appellants' brief, since it merely holds that the possessory right is fixed after discovery. It by no means follows that the claimant of

a pretended location possesses any or all of these rights and privileges, nor that the Government, as the owner of the fee simple title, is precluded from questioning the validity of the location in a proper procedure. It is only a **valid** location which carries any right whatsoever. The mineral statutes of the United States prescribe clearly what the prerequisites are to the existence of such a location and the mere attempt on the part of the appellants to obtain this title and right, by monumentation and recording together with the bare allegation on the part of the individual that he has such right does not establish it, unless these prerequisites are met.

It is true that the claimant in a mineral location is not required, by law, to present himself before the officers of the United States and seek an adjudication of his rights, but this operates as no bar to the right of the owner of the land to object to the claim and use of its land. The United States at no time has yielded up its privilege to call in the claimant and require of him a showing as to his compliance with the law, and on failure to show the necessary discovery, to deny the existence of any claim or location and to cancel the pretended right, in which event the claim of title by possession fails.

That the Government, through its Department of the Interior, has such a right, and that the proper proceeding is in that Department, has been generally recognized by the Department itself in its decisions, and firmly established by the decisions of the courts.

It would appear that the counsel for the appellants in their statement at the top of page 34 of the brief

“that there are no court decisions upon the question which is presented to this Court, and we are not familiar with any Federal law or any rule or regulation of the Land Department even, which can be called to support the Government in its position”

have missed the final decisions of both the courts and of the Land Department, although they have not overlooked decisions tending somewhat to sustain their contentions, and which have subsequently been reversed on final consideration.

In this connection a reference is made to the decision of the First Assistant Secretary of the Interior Vogelsang, in the case *Ex Parte Nichols and Smith*, (46 L. D. 20), reversing the earlier decision of the Interior Department in the same case.

The decision of Secretary Jones in the same case (unreported) as cited in the appellants' brief, is no longer the recognized law of the Department. On motion for rehearing, Secretary Vogelsang's decision rendered February 6, 1917, re-establishes the prior holdings of the Interior Department (See *H. H. Yard et al*, 38 L. D. 59), and after reviewing the authorities, definitely holds that:

“Upon a careful review of this question, and after mature consideration, the Department is convinced that under the law

and authorities it possesses jurisdiction and authority over the subject matter of the present case,"

and this finding by the Interior Department was made although the question at issue was the right of the Department to cancel the location in proceedings instituted by it, before, and in the absence of, any application for patent.

The case, *Cameron v. Lane*, decided by Judge Anderson in the Supreme Court of the District of Columbia, and which is relied on by the appellants, was also reversed in the Court of Appeals of the District of Columbia by Associate Justice Charles H. Robb, (45 App. D. C. 404), directing the dismissal of the bill brought by Cameron against the Secretary of the Interior and officers of the Land Department from proceeding to cancel certain pretended mineral locations. Appeal to the Supreme Court of the United States from the decision of Justice Robb was never perfected.

Whatever authority might have been found in the reversed decisions of Secretary Jones and Judge Anderson, it must, as stated, be kept in mind, the cases are distinguishable from that at bar in that no applications for patent had been filed in either case, and Judge Anderson held that had such application been made, thus presenting the case to the Interior Department, it would have had jurisdiction not only to reject the patent, but to go further, and on establishment of lack of discovery to cancel the locations.

This was a direct recognition of the jurisdiction assumed by the Secretary of the Interior in cancelling the Cape Horn mineral location after application for patent. Judge Anderson in his opinion, which was filed March 15, 1916, says:

“That courts alone have jurisdiction to cancel the location or to determine whether the right thereto does or does not exist, excepting (which is not the case) where a claimant has invoked the jurisdiction of the Department for the purpose of acquiring the ultimate title.”

APPLICATION FOR PATENT NECESSARILY SUBMITS LOCATION TO LAND DEPARTMENT

Sec. 2325, U. S. R. S. prescribes the procedure for obtaining a patent on a mineral location and provides that any person or persons

“having claimed and located a piece of land for such purposes, who has or have complied with the terms of this chapter, may file in the proper land office an application for patent, under oath, showing such compliance.”

Rule 41 of the mining regulations of the Interior Department (44 L. D. 296) requires the applicant for patent to make a full showing as to the mineral vein, lode, etc., alleged to exist within the claim.

The statutes and regulations cited require, on

application for patent, a showing of compliance with the requirements of the law, and this carries with it the establishment of a valid location, based primarily on discovery.

Rights under a location could only follow discovery.

Creede and C. C. Mining Co., v. Uintah T. M. and T. Co., 196 U. S. 337.

The question to be determined by the Land Department in passing on any application for mineral patent is the existence of a valid location and the facts which establish one. If there is no location, the department is without authority to issue patent and having assumed jurisdiction to determine the ultimate title, and being required to pass on the validity of the location, it would be nothing less than absurd that the Land Department should have authority on the one hand to pass complete title out of the United States, or on the other to refuse to pass such title, based on the lack of discovery and invalidity of the location and still have no authority to dispose of the claim on which the application for patent was based, leaving the matter at issue in the same status as when submitted to its jurisdiction.

It is well settled that a mineral patent is conclusive, except on direct attack by the United States for fraud; that the issuance of the patent is an adjudication and like a judgment is final as to all matters which the Land Department must determine prior to its issuance, and that among those things which must be so determined, and on which the

patent is conclusive, is the mineral character of the lands embraced in the patent and the fact that a discovery and valid location have been made.

Carson City Gold & Silver Co. v. North Star Mining Co., 83 Fed. 658, 664.

Talbot v. King, 6 Mont., 76, 9 Pac. 434;

Steel v. St. Louis Smelting etc., Co., 106 U. S. 447, 451;

Calhoun Gold Mining Co. v. Ajax Gold Mining Co., 182 U. S. 499, 510;

Creede & C. C. M. & M. Co. v. Uintah T. M. & T. Co., 196 U. S. 337.

If the Land Department in issuing a patent must determine the validity of a location, it must have the same power when it rejects the application for patent. In both cases it must pass on the validity of the location. If it has authority in one case to determine that a discovery has been made, and that the location is valid, no reason appears why it should not have authority when it finds no discovery has been made, to declare the location invalid.

The appellants herein, if they had received a patent, as a result of the findings of the Interior Department, would be entitled to rely on those findings as conclusive. Are they not as well bound by the decisions of the department when the findings were adverse to them and patent was rejected on the ground that their location itself was invalid? It is submitted that an application for mineral patent necessarily submits the whole question of the validity of

the location to the Land Department and that department may, in a proper case, not only reject the application, but declare the location invalid.

In the case of Nome & Sinook Co., v. Townsite of Nome, 34 L. D. 276, involving conflict between a mineral location and a townsite, the Interior Department said:

“When the protestants here shall apply for patents for their mining claims, should they ever do so, it will be the duty of the Land Department to inquire into and determine any and all questions which may arise under the mining laws generally.”

The contention is sustained by the courts in *Warnekros v. Cowan*, 13 Ariz. 42; 108 Pac. 238, where it is said:

“Upon the filing of an application for patent to public mineral land, the jurisdiction of the land office becomes exclusive as to all questions affecting the title to the lands therein applied for, and so remains until the final determination of the application.”

In the case of *Cameron v. Bass*, 168 Pac. Reporter—advance sheets No. 4., Page 645, the appellant herein, Ralph H. Cameron, sought to enjoin a permittee of the United States Government from occupying a part of the pretended Cape Horn mining location after cancellation of the location by the Interior Department, the lands involved being in part the same as those in the present case, and, injunction

being denied by the Superior Court, the Supreme Court of Arizona recently affirmed the decision, all the judges concurring. The court found that:

“The mineral character of the land embraced within the Cape Horn lode claim was a matter essential to be determined. In the proceeding before the department that matter was inquired into, evidence pro and con was offered, received, and considered. The question of fact of the mineral character of the claim was determined after a full, fair, and comprehensive trial, and on conflicting evidence the Land Department finally determined the essential fact so under consideration, and for all time and all purposes that determination stands as an unimpeachable record of the actual character of the land at the time the appellant commenced his mineral location, called the Cape Horn, and at all times up to and including the date of appellant’s application for patent.”

The court cited with approval the decision of the First Assistant Secretary of the Interior, in the case of Nichols and Smith on rehearing, and the authorities there assembled, as to the jurisdiction of the department, and said: “Both the law and authorities sustain the conclusion reached.”

Later in their discussion they say:

“We may concede that the Land Department has no jurisdiction to cancel a mining

location, yet the effect is the same where the Land Department decides that the land embraced within the boundaries of a mining location was as a fact nonmineral in character, and therefore not subject to location under the mining laws. Where such decision becomes final, certainly the claimant can assert no rights dependent thereon, and while the evidences of location are not physically brought before the department and cancelled, the decision is efficient and sufficient to extinguish absolutely and forever, all force and effect said location presumably ever had, and to destroy such location and all evidence thereof for any purpose.

“Any attempt on the part of the claimant to thereafter assert any right based upon said location, so decided invalid, is a collateral attack upon the decision and without effect.”

The leading case in the Supreme Court of the United States, *Clipper Mining Company, v. Eli Mining and L. Co.*, (194 U. S. 220) involved a conflict between lode and placer claimants of the same land. Application for patent on the placer locations was rejected by the Interior Deptment, but the decision did not declare the placer locations void. Shortly thereafter lode locations were made and adverse was filed by the placer claimants against the applicants for patents on the lodes. Even though the Interior Department had not declared the placer locations

void, the lode claimants contended in the case before the Supreme Court that the decision of the Interior Department rejecting the placer application for patent annulled the placer location, and this must we think, have necessitated consideration by the Supreme Court of the authority of the Interior Department to cancel a location.

The court, speaking through Justice Brewer, fully upheld the authority of the Interior Department, saying: (Page 223):

“So far as the record shows—and the record does not purport to contain all the evidence—the placer location is still recognized in the department as a valid location. Such also was the finding of the court, and being so there is nothing to prevent a subsequent application for a patent and further testimony to show the claimant’s right to one. **Undoubtedly** when the department rejected the application for a patent it could have gone further and set aside the placer location, and it can now, by direct proceedings upon notice, set it aside and restore the land to the public domain.”

Later in the decision, the court said, (Page 234):

“The Land Office may yet decide against the validity of the lode locations and deny all claims of the locators thereto. So also it may decide against the placer loca-

tion and set it aside, and in that event all rights resting upon such location will fall with it."

Even if it be suggested that the language used by the court in that case is dictum, it is certainly entitled to great weight and is practically binding. As to the weight to be given dictum by the Supreme Court, see *Daniels v. Wagner* 205 Fed. 235, 238 (C. C. A. Ninth Circuit.)

The general proposition maintained by the government is not as stated on page 26 of the appellants' brief, that the grantor may determine the rights of the grantee after a grant, but rather that grant may be denied in the absence of compliance with the conditions precedent to the proposed grant. The donor who gives on condition precedent has the sole right to determine compliance with those conditions in advance of the gift.

THE LAND DEPARTMENT APPLIED THE CORRECT RULE OF DISCOVERY IN ITS DECISION, ANNULLING THE CAPE HORN MINERAL LOCATION.

That there is a different rule of discovery to be applied in determining the validity of a location and in passing on application for patent is recognized.

The rule of discovery followed by the Interior Department in the Cape Horn case was that established by the Land Department and the courts as applicable in determining whether the requirements for a valid location had been met.

Considering first on this point the authorities cited in the appellants' brief, the language quoted on page 30 of the revised brief from *Book v. Justice Co.* 58 Fed. 106-120 was not intended by Judge Hawley to be literally construed, as evidenced by his decision for the Circuit Court of Appeals, Ninth Circuit, in *Migeon et al. v. Montana Central Ry. Co.*, 77 Fed. 249-255, where he says:

“The question as to what constitutes a discovery of a vein or lode under the provisions of Sec. 2320 of the Revised Statutes has been decided by many courts. All the authorities cited by appellants are referred to in *Book v. Mining Co.* 58 Fed. 106,121. The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: That the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and

subsequent locator of a mining claim on the same lode.”

Both cases decided by Judge Hawley, Book v. Justice and Migeon v. Railway Co., involved adverse claims by mineral claimants. It is well established, as stated by Lindley, 3rd Ed, page 765, that:

“The tendency of the courts is toward marked liberality of construction where a question arises between two miners who have located claims upon the same lode . . . and toward strict rules of interpretation when the miner asserts rights in property which either *prima facie* belongs to someone else or is claimed under laws other than those providing for the disposition of mineral lands.”

The rule laid down in these cases, therefore, is most liberal as to what constitutes a valid location and was applied merely to determine the rights to the presumptive location as between the adverse claimants. The judgment in neither case decided the rights of the parties as against the United States, and left the successful party still to establish the fact of sufficient discovery in order to establish right to possession of the lands of the United States in the event that the right should be questioned. Even so, the liberal rule followed by the court in the Migeon case was followed by the Interior Department in deciding the validity of the Cape Horn loca-

tion. No attempt was made to apply the more strict rule laid down in the other class of cases.

The text book authority, Lindley on Mines, 3rd Ed. is cited in the brief of the appellants, pages 30 to 32. However, the matter quoted is hardly in point since the Cape Horn decision was not based on a requirement that the discovery to validate the location, must, "when worked, yield a profit," nor did it require "ore of a commercial value." It is as to a theory requiring commercial value rather than the holding as to discovery on the Cape Horn location, that the writer concludes results would be unjust, and this conclusion, it will be noted, is not in the words of the author, but is in fact a quotation by him from the decision in *Book v. Justice by Judge Hawley*, and the effect of that decision has already been stated.

Appellants seemingly contend that the mere finding of mineral, no matter how small the showing, is **alone** sufficient to support a location. This contention is, we think, incorrect. The decisions of the Land Department and of those courts whose views are controlling on a question of Federal law, are completely in accord as to what constitutes a discovery sufficient to support a location.

The leading authority on the question as to what constitutes a discovery of mineral sufficient to support a location is the decision of the Interior Department in *Castle v. Womble*, 19 L. D. 455, 457, as follows:

“Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby ‘all valuable’ mineral deposits in lands belonging to the United States * * * are * * * declared to be free and open to exploration and purchase.”

The rule is re-stated, perhaps more clearly, in *Jefferson-Montana Mines Co.*, (41 L. D. 320) which was approved by Assistant Secretary Jones in *East Tintic Consolidated Mining Co.*, (43 L. D. 79) as follows:

“After a careful consideration of the statute and the decisions thereunder, it is apparent that the following elements are necessary to constitute a valid discovery upon a lode mining claim:

1. There must be vein or lode of quartz or other rock in place;
2. The quartz or other rock in place must carry gold or some other valuable mineral deposit.
3. The two preceding elements, when

taken together, must be such as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine.

It is clear that many factors enter into the third element: The size of the vein as far as disclosed, the quality and quantity of mineral it carries; its proximity to working mines and location in an established mining district, the geological conditions, the fact that similar veins in the particular locality have been explored with success, and other like facts, would all be considered by a prudent man in determining whether the vein or lode he has discovered warrants a further expenditure or not."

In *Chrisman v. Miller*, 197 U. S. 313, the Supreme Court cited with approval the rule laid down in *Castle v. Womble*, *supra*. This case (*Chrisman v. Miller*) was a dispute between two placer locations. The court recognized a distinction between controversies between mineral locators, and controversies between a mineral and an agricultural claimant, and held that the rule respecting discovery is more liberal in the first class of cases than in the latter where the land is sought to be taken out of the category of agricultural lands. Recognizing that the case it had under consideration came within the first class where the more liberal rule should be applied, the court nevertheless cited and applied the rule laid down in *Castle v. Womble*, *supra*. It also held that

mere **willingness** on the part of the locator to further expend his labor and means was not the criterion.

To the same effect is the decision of the Circuit Court of Appeals of the 9th Circuit in *Multnomah Min. Co. v. U. S.*, 211 Fed. 100, where it was held (syllabus):

“The discovery of mineral, essential to valid mining location on public land, is not satisfied by a finding of traces of gold, but mineral must be found in sufficient quantities to justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.”

Lindley on Mines (3rd Edition) Par. 336, states:

“The facts which are within the observation of the discoverer, and which induce him to locate, should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money in the development of the property.”

This quotation from Lindley is approved in *Chrisman v. Miller*, **supra**: *Multnomah Min. Co. v. U. S.*, **supra**; *Steele v. Tanana Mines R. Co.*, 148 Fed. 678, 680. See also *Mason v. Washington-Butte Min. Co.*, 214 Fed. 32, 35.

“There must be some gold found within the limits of the land located as a placer gold claim, but it cannot be said in advance as a

matter of law how much must be found in order to warrant the court or jury in finding that there was in fact a discovery such as the law requires. The question must be decided, not only with reference to the gold actually found within the limits of the claim located, but also in view of its situation with reference to other lands known to contain valuable deposits of placer gold, and whether its rock and soil formation are such as is usually found where these deposits exist in paying quantities; and further, in considering the evidence bearing upon the general question, it must not be forgotten that the object of the law in requiring the discovery to precede location is to insure good faith upon the part of the mineral locator, and to prevent frauds upon the government by persons, 'attempting to acquire patents to land not mineral in its character.' (Shoshone Min. Co. v. Rutter 87 Fed. 801, 31 C. C. A. 223.)" *Lange v. Robinson*, 148 Fed. 799, 803.

These authorities show that the rule of discovery, as established by the courts as well as the Land Department, does not require the finding of pay ore, but that something more than the finding of a trace or very small amount of mineral is required—viz., that the surrounding facts and circumstances be such as to justify an ordinarily prudent man in the

further expenditure of his labor and means in the development of the property.

The decision of the Department of the Interior of February 11, 1909, now under discussion, was based principally on the cases of *Castle v. Womble* and *Chrisman v. Miller*, *supra*; and it is evident that the Land Department in that decision applied the rule above laid down. It considered the evidence with respect to the finding of mineral within the boundaries of the claim, together with the surrounding circumstances and reached the conclusion that the showing would not justify further development.

But even if the Interior Department had undertaken to apply in the Cameron case a more strict rule as to discovery, as contended by defendant, it would have been clearly justified in doing so.

At the time the Cape Horn claim was located, the land involved was withdrawn for National Forest purposes. The Act of June 4, 1897 (30 Stat. 11, 36) provides with respect to lands within National Forests that

“any **mineral lands** in any forest reservation **which have been or which may be shown** to be such, **and subject to entry** under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provision herein contained.”

It will be noted that this Act throws open to location only “mineral” lands shown to be such,

and only lands "subject to **entry**" under the mining laws. A mining claim can be initiated in a National Forest only for mineral lands subject to **entry** as distinguished from location. In view of this provision of law the Land Department would be justified in requiring in support of a location, proof of the character of the land sufficient to support an entry for patent. This view is supported by the case of *U. S. v. Lavenson*, 206 Fed. 755, 763, where the court says:

"The following sections of the statute of 1891 show that relative values are involved as much as in the instance recited by the defendants, and further show that discovery alone is not sufficient, and that nothing short of a probably commercially valuable mine will suffice in a forest reserve."

The Court then proceeds to set forth the National Forest Acts above referred to.

Attention is further called to the fact that the decision of the Interior Department now under consideration was not rendered in a controversy between mineral claimants, but in a case where one of the parties alleged the land to be non-mineral in character. In such a case it would seem that the more liberal rule referred to in *Chrisman v. Miller*, *supra*, as governing controversies between mineral claimants is not applicable; and that the Interior Department would have been justified in holding the mineral claimant to the high degree of proof neces-

sary to take the land out of the category of agricultural lands.

It is submitted, therefore, that even if the appellants could be held to be entitled to raise the question, they are entirely mistaken in their contention that the Department of the Interior erred in applying the law in its decision annulling the Cape Horn location.

THE DECISION OF THE LAND DEPARTMENT
THAT THE LAND INVOLVED WAS NON-
MINERAL, THAT NO DISCOVERY HAD
BEEN MADE, AND ANNULING THE LO-
CATION ON THESE GROUNDS, IS CON-
CLUSIVE ON THE COURTS IN THIS AC-
TION.

The effect to be given decisions of the Land Department made in proceedings within its jurisdiction, is so well settled by the numerous decisions of the courts both State and Federal, that any extended discussion would seem unnecessary. The following general rules are applicable to decisions of the Land Department where called in question in the courts.

The Land Department of the United States is a quasi judicial tribunal, invested with authority to hear and determine claims to the public lands subject to its disposition, and the decisions of that Department on questions of fact in proceedings within

its jurisdiction are, in the absence of fraud or imposition, conclusive and binding on the courts.

Johnson v. Towsley, 13 Wall, 72, 83, 20 L. Ed. 485.

Lee v. Johnson, 116 U. S. 48, 29 L. Ed. 570.

Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424.

DeCambra v. Rogers, 189 U. S. 419, 47 L. Ed. 734.

Heath v. Wallace, 138 U. S. 573, 34 L. Ed. 1063.

Shank v. Holmes (Arizona), 137 Pac. 871.

Old Dominion Copper etc. Co. v. Haverly, 11 Ariz. 241, 90 Pac. 333.

Wormouth v. Gardner (Calif), 58 Pac. 20.

Jeffords v. Hine, 2 Ariz. 162, 11 Pac. 351.

James v. Germania Iron Co., 107 Fed. 597.

McGoldrick Lbr. Co. v. Kensolving, 221 Fed. 819.

“If there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the Land Department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts.” Johnson v. Drew, 171 U. S. 93, 99, 43 L. Ed. 88, 91.

On the other hand, if on the uncontradicted facts, or on the facts as found by the Land Department, that Department erroneously applies the law, a court of equity will in a proper proceeding give redress.

Johnson v. Towsley, 13 Wall, 72, 83, 20 L. Ed. 485.

Vance v. Burbank, 101 U. S. 514, 519, 25 L. Ed. 929.

James v. Germania Iron Co., 107 Fed. 597.

It should be observed, however, that it is to the error in applying the law to the facts found or established without dispute **in the hearing before the Land Department**—i. e. to the case as established in that Department—that the rule applies, (Van Patten v. Boyd), (N. M.), 150 Pac. 917, Sanford v. Sanford, 139 U. S. 642; 35 L. Ed. 290); and the mistake in applying the law to such facts must be clear. (Moore v. Robbins, 96 U. S. 530, 535, 24 L. Ed. 848.)

If the decision of the Land Department involves a mixed question of law and fact and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the Department is conclusive.

Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800.

Whitcomb v. White, 214 U. S. 15.

Jeffords v. Hine, 2 Ariz. 162, 11 Pac. 351.

The character of a given tract of land, as mineral, swamp, etc., is a question of fact.

McCormick v. Hayes, 159 U. S. 332, 40 L. Ed 171.

Heath v. Wallace, 138 U. S. 573, 34 L. Ed. 1063.

Earl v. Morrison (Nev.) 154 Pac. 75.

Steel v St. Louis Etc. Co. 106 U. S. 447, 27 L. Ed. 226.

Diamond Coal & Coke Co. v. U. S., 233 U. S. 236, 239.

Burke v. So. Pac. Ry. Co., 234 U. S. 669, 691

“It has undoubtedly been affirmed over and over again that in the administration of the public land system of the United States questions of fact are for the consideration and judgment of the Land Department, and that its judgment thereon is final. Whether, for instance, a certain tract is swamp land or not, saline land or not, **mineral land or not**, presents a question of fact not resting on record, dependent on oral testimony; and it cannot be doubted that the decision of the Land Department, one way or the other, in reference to these questions is conclusive and not open to relitigation in the courts, except in those cases of fraud, etc., which permit any determination to be re-examined.” *Burfenning v. Chicago etc. Ry. Co.*, 163 U. S. 321, 41 L. Ed. 175, 176.

Coming now to the application of these rules to the case at bar: No question of fraud or imposition is involved. The whole matter, so far as this record is concerned, rests on the Decisions of the Department of the Interior (Appellee's Exhibits D, E, and F). An examination of the decision dated February 11, 1909 (Appellee's Exhibit D) discloses that the issue of primary importance before the Depart-

ment was the character of the land embraced in the lode location. Both parties to that proceeding introduced expert testimony and evidence of assays. The decision discusses the situation of the Cape Horn and other claims; the rock formation disclosed; the mineral development (or rather lack of it) in the immediate vicinity of the Cape Horn, and other surrounding circumstances; the expert evidence; the assay returns for the applicant (appellant here), showing some mineral, and those of the protestant showing practically nothing in the way of mineral; and reaches the conclusion that "assay returns such as these, considered in connection with all the circumstances here disclosed, wholly fail to establish the actual mineral character of the lands involved"; and further that no discovery had been made.

This decision was, it is plain, reached after a consideration of conflicting evidence. It was a decision of a question of fact, a determination of the character of the land; and under the decisions above cited it is conclusive. The question involved cannot be relitigated in this action.

It will be noted that the appellants' case stands solely on the same Cape Horn location that was involved in the proceedings before the Interior Department. There is nothing in the record indicating any attempted relocation of the land subsequent to the termination of those proceedings (in fact such a location would have been ineffective within the National Monument).

It having been conclusively determined by the Land Department that the land embraced in this Cape Horn location is non-mineral in character, that there was no discovery and that such location is invalid, it is submitted that in this Court such location must be regarded as non-existent and as furnishing no basis for appellants' contention.

Appellants, in their brief, apparently attempt to attack the decision of the Land Department, referred to above, on the ground that it applied an erroneous rule as to what constitutes a discovery within the meaning of the mining laws. However, as we have shown above, the primary question decided by the Interior Department was the non-mineral character of the land which is a question of fact. Furthermore, as is pointed out above, the decision was reached after a consideration of conflicting evidence. The assays submitted by the protestant varied widely from those submitted by the applicant for patent. There is no justification for the appellants treating the applicant's evidence in the Interior Department proceeding as true and claiming an erroneous application of the law to the facts such evidence tended to prove. Under the authorities above cited, they must show that the law was erroneously applied to the facts found, or established without dispute, and if the ultimate facts found, or undisputed, are not clearly shown, and cannot be separated from the questions of law, the decision of the Department is conclusive.

Finally, it is clear that the Interior Department

applied the correct rule of discovery in the case at bar.

Section 2325 R. S. U. S., cited on page 35 of the revised brief, merely establishes the prima facie right of a mineral applicant to patent, at the expiration of the sixty-day period fixed, and limits the period for filing an adverse under Sec. 2326 U. S. R. S. by "third parties." It is the duty of the Land Department, before issuing patent to determine that the requirements of the law have been met, and the fact that such adverse claim has not been filed during the period of publication, in no way relieves the department of that duty, nor precludes the exercise of discretion and the right of inquiry into the facts by the Department itself before issuance of the patent.

Section 2325, as cited, is not applicable to this case.

The appellants urge, on page 32, that the provision for submission to the courts of determination of the rights of possession through adverse indicates some intention on the part of Congress to leave, in all cases, the determination of the validity of a mining location to the courts. Consideration of the limited purposes of the technical adverse will show no such intention on the part of Congress. In *Warnekros v. Cowan*, 13 Ariz. 42, 108 Pac. 238 the court discusses the purpose of this section and holds:

"The question being open to determination in this territory, we adopt the view that this section creates a statutory exception to

the **exclusive** jurisdiction of the land office and that our courts hear and determine suits in aid of an adverse in the exercise of their general jurisdiction.”

The statute speaks only of suits between rival mineral claimants and has no application to controversies between parties, (as was the case here) where one alleges the land to be non-mineral in character. The question of validity of a mineral location involves the character of the land and the fact of discovery, neither of which can be determined by the courts under Sec. 2326, and the jurisdiction of the Department on these questions is not affected by it.

Lindley on Mines, 3rd Ed., Par. 765 quoted with approval in *Clipper Mining Co., v. Eli Mining Co.*, 194 U. S. 220, 233. *Lefevre v. Amonson* 81 Pac. 71, *Wright v. Town of Hartville* 81 Pac. 649. *Doe v. Waterloo Min. Co.* (C. C. A. 9th Circuit) 70 Fed. 455, 462.

The case of *Perego v. Dodge*, 163 U. S. 160, 168, disposes of the matter conclusively:

“It must be remembered that it is ‘the question of the right of possession’ which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the government may

be determined by the courts in a suit against the latter."

The second argument presented in the appellants' brief, that the finding by the Secretary of the Interior that the land is non-mineral in character, and as to the fact of discovery was a conclusion of law and not of fact, has already been disposed of.

The third argument is also met by our earlier discussion, since if the Interior Department had jurisdiction and its findings were conclusive, no error occurred in refusing to admit in evidence the statement of evidence excluded.

The fourth and last contention of the appellants is that the appellants herein are entitled to a decree because of failure of the appellee to make formal and separate reply to the so-called separate defense. The complaint filed in this case and the answer thereto presented all the facts and raise the same issues as are attempted to be separately set up in this part of the answer. Can it be contended that where the pleading and facts at issue are once complete and the issues presented to the court, the defendants can require a re-statement of the complaint merely by presenting the same matter in a separate answer?

In any event, the allegations of the separate defense are deemed denied.

The evidence offered by the appellants having been properly excluded, can no more be used to support the allegations of the separate defense than those of the answer. No evidence, therefore, is be-

fore the court which is properly admissible for consideration under the separate answer.

Wherefore, in view of the foregoing, it is respectfully submitted that the judgment and decree of the United States District Court for the District of Arizona should be affirmed.

THOMAS A. FLYNN,
United States Attorney,

J. O. SETH,
Special Assistant to
United States Attorney,

MORTON M. CHENEY,
Assistant to the Solicitor,
Department of Agriculture,
Solicitors for Appellee.

United States
Circuit Court of Appeals
For the Ninth Circuit.

FEDERAL MINING & SMELTING COMPANY, a
Corporation,

Plaintiff in Error,

vs.

LOUIS ANDERSON,

Defendant in Error.

Transcript of the Record

Filed

MAY 23 1917

F. D. Monckton,
Clerk.

*Upon Writ of Error from the United States District
Court for the District of Idaho, Northern
Division.*

No.

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Names and Addresses of Attorneys of Record

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Wallace, Idaho,

Attorneys for Plaintiff in Error.

MESSRS. McFARLAND & McFARLAND,

Coeur d'Alene, Idaho,

Attorneys for Defendant in Error.

In the District Court of the United States for the District of Idaho, Northern Division.

LOUIS ANDERSON,

Plaintiff,

vs.

FEDERAL MINING AND SMELTING COMPANY, a Corporation,

Defendant.

No. 655.

COMPLAINT.

The above named plaintiff complains of the above named defendant, and for cause of action alleges:

I.

That at all of the times herein mentioned plaintiff was and yet is a resident of Shoshone County, State of Idaho; and defendant was and yet is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and authorized to transact and do business in the State of Idaho.

II.

That at all of said times defendant was the owner, in the possession of, and developing, operating and working that certain quartz mining lode or ledge situated near the Village of Mullan, in Shoshone County, State of Idaho, named, known as, and called the Morning Mine.

III.

That for a period of about one year next prior to and including the 8th day of May, A. D. 1916, plaintiff was in the employ of said defendant as machine man in said Morning Mine, and that it was his duty

among other things, by reason of said employment, to operate a certain machine commonly known as and called a compressed air drill or driller, which was then and there used by defendant in said Morning Mine for the purpose of drilling through rock and ledge matter of said mine.

IV.

That at all of the times herein mentioned, it was the duty of defendant to furnish and provide plaintiff a safe place to work in, at and upon, in said Morning Mine, but that disregarding its said duty in the premises and in this respect, it knowingly, carelessly and negligently permitted the place in said Morning Mine where plaintiff was performing his said duties, and hereinafter more particularly described, to become and remain in a dangerous and unsafe condition, in this, that it carelessly and negligently permitted the rock and ledge matter in and through which plaintiff was operating the drills of said compressed air drill or driller, and which was then and there situated above and over the head of plaintiff, to become loose and insecure.

V.

That on to-wit: the 8th day of May, A. D. 1916, and while plaintiff was engaged in the performance of his said duties on which is known as the 16-hundred foot level, on the west side of the eighth floor between what is known in said Morning Mine as the eleventh and twelfth ore chutes in the second cut, *and while he was operating said compressed air drill or driller in drilling into and through said overhang-*

ing rock and ledge matter in said Morning Mine, without any fault or negligence on his part, a large quantity, to-wit, about nine tons of said loose and insecure rock and ledge matter gave way, broke loose and fell upon, covered up and remained upon plaintiff for the period of about twenty (20) minutes, whereby plaintiff was greatly hurt, bruised, wounded, lamed and crippled; that plaintiff by reason of the falling of said rock and ledge matter upon him was greatly injured in his head and on his right side, and his right foot was greatly crushed and the ligaments thereof torn and bruised, and the joint of his right foot was greatly bruised, sprained and wrenched, and that plaintiff's right arm and shoulder were greatly bruised, wrenched and crippled, and that his back was wrenched, twisted, strained, weakened and crippled.

VI.

That by reason of the aforesaid injuries sustained by plaintiff he has suffered and still suffers great physical and mental pain and anguish; that by reason of the injury to his head, his hearing has become impaired, and it is painful for him to eat or to open his mouth; that in consequence of the injuries to his right shoulder and arm, he has been rendered, and is unable to straighten out or otherwise use his said arm; that in consequence of the injuries received to his right foot, he has been and is unable to bear his weight upon said foot and is crippled and lamed therein; that by reason of the aforesaid injuries to his back, his back has become and is greatly weak-

ened and at all times pains him; that in consequence of all of said injuries, plaintiff is able to sleep but very little during the night and that his said injuries are so painful that by reason thereof he is kept awake during most of the night.

VII.

That at and prior to the time of receiving the injuries aforesaid, plaintiff did not know and had no means of knowing, and by the exercise of due care, caution and diligence could not have discovered the dangerous and unsafe condition of the place in, at and where he was performing his said duties, and did not know, and had no means of knowing, and by the exercise of due care, caution and diligence, could not have discovered that the said rock and ledge matter then and there being above and over him in the said Morning Mine where he was performing his said duties, were loose, insecure or otherwise dangerous or unsafe; that upon said day plaintiff commenced his work, which was at a period of time known as and called the night shift, about the hour of 6 o'clock of the night of said day, and that prior to commencing his said duties in the operation of said compressed air drill or driller, he carefully and cautiously examined and inspected the place in which he was performing his said duties and carefully inspected and examined the said overhanging rock but did not discover and could not discover that said rock and ledge matter was loosened or insecure or liable to fall upon him; that the unsafe and dangerous condition of said rock and ledge matter in the

place in said Morning Mine where plaintiff was then performing his said duties was not patent or obvious and that plaintiff sustained said injuries without any fault or negligence on his part; that the defendant at and prior to the time plaintiff received said injuries, knew of the unsafe and dangerous condition of said Morning Mine at the place where plaintiff was performing his said duties, and knew of the loose, insecure and unsafe and dangerous condition of the said overhanging rock and ledge matter which fell upon plaintiff as aforesaid, or could by the exercise of ordinary care or diligence have discovered said unsafe and dangerous condition of said rock and ledge matter and the place where plaintiff was performing his said duties in said Morning Mine, but knowingly, carelessly and negligently permitted plaintiff to enter upon and continue the performance of his said duties without apprizing, warning or notifying him of said dangers:

VIII.

That up to and at the time of sustaining the injuries aforesaid, plaintiff was a strong, healthy, able-bodied man of the age of only thirty-eight (38) years and was capable of earning and was earning Four and one-half (\$4.50) Dollars per day; that the injuries sustained by plaintiff as aforesaid are permanent and lasting injuries and that plaintiff will continue to suffer great physical and mental pain in consequence thereof during the remainder of his life; that in consequence of said injuries plaintiff's earning capacity has been greatly diminished if not totally destroyed.

IX.

That by reason of the injuries sustained by plaintiff as aforesaid he has been and is damaged in the sum of Fifteen Thousand (\$15,000) Dollars, no part of which has been paid.

WHEREFORE, plaintiff prays judgment against said defendant for said sum of Fifteen Thousand (\$15,000) Dollars, together with his costs and disbursements incurred in this action.

McFARLAND & McFARLAND,
Attorneys for Plaintiff,
P. O. Address, Coeur d'Alene, Idaho.

State of Idaho,
County of Shoshone,—ss.

Louis Anderson being first duly sworn, deposes and says: That he is the plaintiff named in the above and foregoing complaint; that he has read said complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters, he believes it to be true.

LOUIS ANDERSON,
Subscribed and sworn to before me this 10th day of June, 1916.

(Seal.)

A. L. NICHOLSON,
Notary Public in and for the State of Idaho,
residing at Wallace, Idaho.

Filed June 12, 1916.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

No. 655.

SUMMONS.

THE PRESIDENT OF THE UNITED STATES

To Federal Mining and Smelting Company, a corporation, the above named defendant, GREETING:

You are hereby commanded to be and appear in the above entitled court, holden at Coeur d'Alene, Kootenai County, Idaho, in said district, and answer the complaint filed against you in the above entitled action within twenty (20) days from the date of service of this summons upon you, if served within the Northern Division of this district, or if served within any other division of said district, then within forty (40) days from the date of such service upon you, and if you fail so to appear and answer, for want thereof, the plaintiff will apply to the court for the relief demanded in the complaint, to-wit, for the sum of Fifteen Thousand dollars (\$15,000) damages, sustained by plaintiff in the Morning Mine of defendant, near the village of Mullan, County of Shoshone, State of Idaho, on the 8th day of May, 1916, through the carelessness and negligence of defendant in failing to provide plaintiff, then in its employ, a safe place in which to work and labor in said Morning Mine, and by reason whereof large quantities of loose rock and ledge matter fell upon and crushed, injured, bruised and wounded plaintiff without any fault on his part and by reason of which said injuries, so sustained, plaintiff was damaged in said sum

of Fifteen Thousand dollars (\$15,000), and for costs of this action.

The cause of action of plaintiff is more fully and completely stated in his verified complaint herein, a copy of which is hereto attached and made a part hereof.

And this is to COMMAND you, the Marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

WITNESS the Honorable FRANK S. DIETRICH, Judge of the District Court of the United States, and the seal of said Court, affixed at Coeur d'Alene, Idaho, in said district, this 12th day of June, 1916.

(Seal.)

W. D. McREYNOLDS,

By Lawrence M. Larson, Deputy Clerk.

McFarland & McFarland,

Attorneys for Plaintiff,

P. O. Address, Coeur d'Alene, Idaho.

Filed June 29, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

STIPULATION FOR APPEARANCE, Etc.

It is hereby agreed and stipulated by and between the Plaintiff and the Defendant, in the above entitled action, as follows:

I.

That the defendant hereby acknowledges service of the Summons herein by receipt of a true and cor-

rect copy thereof attached to a true copy of the Complaint on file in said cause, and does hereby waive any and all other and further service of said Summons, and further, does hereby enter an appearance in this action.

II.

That the defendant have, and is hereby given and granted 30 days from the date hereof, in which to answer, plead or demur to the complaint of plaintiff, or to move against the same or to file any motion, plea or other objection thereto.

III.

That the defendant does not waive any rights hereby, except service of the Summons and Complaint by the United States Marshal or his deputy or such other persons authorized to make such service.

Dated this 27th day of June, A. D. 1916.

FEATHERSTONE & FOX,

Attorneys for Defendant.

McFARLAND & McFARLAND,

Attorneys for Plaintiff.

Filed June 29, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

DEMURRER.

Comes now the defendant and demurs to the complaint of the plaintiff heretofore filed herein and for cause of demurrer alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is indefinite and uncertain in this, that said complaint fails to show how or in what manner the defendant was careless or negligent or how or in what manner this defendant allowed the rock and ledge matter in and through which plaintiff was operating drills, and which was situated above and over the head of the plaintiff to become loose and insecure.

III.

That said complaint fails to show how or in what manner the defendant failed to perform its duties in inspecting the said place or in notifying the said plaintiff of the fact that the said rock and ledge matter was loose, insecure, unsafe and dangerous.

IV.

Said complaint fails to show how or in what manner or by what means the said defendant knew or could have known or by a reasonable inspection could have discovered that the said rock and ledge matter at the place where plaintiff was performing his duties was loose, or unsafe or insecure or in a dangerous condition, or how or in what manner or by what means the said defendant could have ascertained said facts when the same could not be ascertained by the plaintiff after having made a careful inspection of the said back, from which the rock and ledge matter which are alleged to have fallen upon plaintiff came from.

WHEREFORE defendant prays judgment of this
its demurrer that it be dismissed hence with its costs
herein sustained.

FEATHERSTONE & FOX,

Attorneys for Defendant, Federal Mining & Smelting
Co. Residence and Postoffice address: Wallace,
Idaho.

Service acknowledged.

Filed July 22, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

DECISION ON DEMURRER.

Aug. 23, 1916.

McFarland & McFarland, Attorneys for Plaintiff.

Featherstone & Fox, Attorneys for Defendant.

DIETRICH, DISTRICT JUDGE:

It may very well be true that general allegations to
the effect that it was the duty of the defendant to pro-
vide a reasonably safe place for the plaintiff to work,
and that it knowingly suffered the place to become
unsafe, in that it permitted rock overhanging the
point where the plaintiff was drilling to become loose
and insecure, as a consequence of which the plaintiff
was injured, etc., would be sufficient to state a cause
of action, but here the plaintiff has gone further, and
by the alternative statement that defendant ought to
have known of the perilous condition he has qualified
the allegation that it actually did know. And then
he has still further alleged facts from which it ap-

pears that he was an experienced miner, and that just before the accident he himself made a careful and cautious inspection of the rock, but "did not discover and could not discover that said rock and ledge matter was loosened or insecure or liable to fall upon him". But if the plaintiff could not upon "a careful and cautious" inspection discover the defective condition, in what respect was the defendant derelict in the performance of its duty? Possibly it was negligent, but in view of the present state of the pleading in the respects pointed out, the general charges cannot be held to be sufficient. The master does not insure or guarantee the safety of the place. He undertakes only to use reasonable care in providing and maintaining such a place. How was the defendant here negligent? What specifically was its duty in the premises, and in what particular did it fail to discharge this duty? If, as alleged, it ought to have known of the insecurity of the place, how could it discover the alleged defective condition?

The demurrer is sustained, with leave to plaintiff to amend within ten days.

Filed Aug. 23, 1916.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 655.

AMENDED COMPLAINT

Now comes the above named plaintiff and by this his amended complaint herein for cause of action against the above named defendant alleges:

I.

That at all of the times herein mentioned plaintiff was and yet is a resident of Shoshone County, State of Idaho; and defendant was and yet is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and authorized to transact and do business in the State of Idaho.

II.

That at all of said times defendant was the owner, in the possession of, and developing, operating and working that certain quartz mining lode or ledge situated near the village of Mullan in Shoshone County, State of Idaho, named, known as, and called the Morning Mine.

III.

That for a period of about one year next prior to and including the 8th day of May, A. D. 1916, plaintiff was in the employ of said defendant as machine man in said Morning Mine, and that it was his duty, by reason of said employment, to operate a certain machine commonly known as and called a compressed air drill or driller, which was then and there used by defendant in said Morning Mine for the purpose of drilling through rock and ledge matter of said mine.

IV.

That at all of the times hereinmentioned, it was the duty of defendant to furnish and provide plaintiff a reasonably safe place to work in, at and upon, in said Morning Mine, but that, disregarding its said duty in the premises and in this respect, it care-

lessly and negligently suffered the place in said Morning Mine where plaintiff was performing his said duties, and hereinafter more particularly described, to become and remain in a dangerous and unsafe condition, in this, that it carelessly and negligently permitted the rock and ledge matter, in and through which plaintiff was operating the drills of said compressed air drill or driller, and which was then and there overhanging the place where plaintiff was performing said work, to become loose and insecure.

V.

That on, to-wit, the 8th day of May, A. D. 1916, and while plaintiff was engaged in the performance of his said duties on what is known as the 16-hundred foot level, on the west side of the eighth floor between what is known in said Morning Mine as the eleventh and twelfth ore chutes in the second cut, and while he was operating said compressed air drill or driller in drilling into and through said overhanging rock and ledge matter in said Morning Mine, without any fault or negligence on his part, a large quantity, to-wit, about nine tons of said loose and insecure rock and ledge matter gave way, broke loose and fell upon, covered up and remained upon plaintiff for the period of about twenty (20) minutes, whereby plaintiff was greatly hurt, bruised, wounded, lamed and crippled; that plaintiff by reason of the falling of said rock and ledge matter upon him was greatly injured in his head and on his right side, and his right foot was greatly crushed and the ligaments thereof torn and

bruised, and the joint of his right foot was greatly bruised, sprained and wrenched, and that plaintiff's right arm and shoulder were greatly bruised, wrenched, and crippled, and that his back was wrenched, twisted, strained, weakened and crippled.

VI.

That by reason of the aforesaid injuries sustained by plaintiff he has suffered and still suffers great physical and mental pain and anguish; that by reason of the injury to his head, his hearing has become impaired, and it is painful for him to eat or to open his mouth; that in consequence of the injuries to his right shoulder and arm, he has been rendered and is unable to straighten out or otherwise use his said arm; that in consequence of the injuries received to his right foot, he has been and is unable to bear his weight upon said foot and is crippled and lamed therein; that by reason of the aforesaid injuries to his back, his back has become and is greatly weakened and at all times pains him; that in consequence of all of said injuries, plaintiff is able to sleep but very little during the night and that his said injuries are so painful that by reason thereof he is kept awake during the most of the night.

VII.

That at and prior to the time of receiving the injuries aforesaid, plaintiff did not know and had no means of knowing and by the exercise of due care, caution and diligence could not have discovered the dangerous and unsafe condition of the place in, at and where he was performing his said duties, and

did not know, and had no means of knowing, and by the exercise of due care, caution and diligence, could not have discovered that the said rock and ledge matter then and there being above and over him in the said Morning Mine where he was performing his said duties, were loose, insecure or otherwise dangerous or unsafe; that upon said day plaintiff commenced his work, which was at a period of time known as and called the night shift, about the hour of six o'clock on the night of said day, and that prior to commencing his duties in the operation of said compressed air drill or driller, he examined and inspected the place in which he was performing his said duties, and examined the said overhanging rock and ledge matter with as much care and caution as he was able to exercise; that he was not provided with any means for testing the condition of said overhanging rock and ledge matter and had no instrument with which so to do; that he did not discover, and could not, by the exercise of reasonable care and caution, have discovered that said rock and ledge matter was loosened or insecure or liable to fall upon him; that, under the terms of plaintiff's employment, it was not his duty to test the condition of said overhanging rock and ledge matter, but that it was the duty of defendant to carefully examine and test the condition of said overhanging rock and ledge matter before plaintiff commenced the performance of his said duty in the operation of said drill or driller, which defendant negligently omitted to do; that plaintiff, prior to receiving said injuries and prior

to the time he commenced the performance of his said duties as aforesaid, had a right to believe and did believe that defendant had carefully inspected and tested the condition of said overhanging rock and ledge matter, and that the same was in a safe condition; that the defendant, at and prior to the time plaintiff received said injuries, could, by the exercise of ordinary care, caution or diligence, have discovered said unsafe and dangerous condition of said rock and ledge matter in the place where plaintiff was performing his said duties, but negligently and carelessly failed to do so, and carelessly and negligently permitted plaintiff to enter upon and continue the performance of his said duties without apprizing warning or notifying him of said dangers.

VIII.

That up to and at the time of sustaining the injuries aforesaid, plaintiff was a strong, healthy, able-bodied man of the age of only thirty-eight (38) years and was capable of earning and was earning four and one-half dollars (\$4.50) per day; that the injuries sustained by plaintiff as aforesaid are permanent and lasting injuries and that plaintiff will continue to suffer great physical and mental pain in consequence thereof during the remainder of his life; that in consequence of said injuries plaintiff's earning capacity has been greatly diminished, if not totally destroyed.

IX.

That by reason of the injuries sustained by plaintiff as aforesaid he has been and is damaged in the

sum of Fifteen Thousand Dollars (\$15,000), no part of which has been paid.

Wherefore plaintiff prays judgment against said defendant for said sum of Fifteen Thousand Dollars (\$15,000), together with his costs and disbursements incurred in this action.

McFARLAND & McFARLAND,

Attorneys for Plaintiff,

P. O. Address: Coeur d'Alene, Idaho.

United States of America,

State of Idaho, County of Kootenai,—ss.

Louis Anderson, being first duly sworn, deposes and says: That he is the plaintiff named in the above and foregoing amended complaint; that he has read said amended complaint, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief and as to those matters he believes it to be true.

LOUIS ANDERSON,

Subscribed and sworn to before me this 29th day of August, A. D. 1916.

JAS. H. FRAZIER,

(Seal.)

*Notary Public in and for the
State of Idaho.*

My commission expires 8-8-1918.

United States of America,

State of Idaho, County of Kootenai,—ss.

R. E. McFarland, being first duly sworn, deposes and says: That he is one of the attorneys of record of the plaintiff named in the above entitled action; that he served the above and foregoing Amended

Complaint upon the above named defendant at Wallace, Shoshone County, State of Idaho, on the 29th day of August, 1916, by depositing in the United States Post Office at Coeur d'Alene, Idaho, an envelope addressed to Featherstone & Fox, the attorneys for the above named defendant, at Wallace, Idaho, which said envelope at said time contained a true and correct copy of the said amended complaint, and that affiant, before depositing said envelope in said post office, prepaid the postage thereon; That at all of said times there was and yet is daily communication by mail between said cities of Coeur d'Alene and Wallace, Idaho.

R. E. McFARLAND,

Subscribed and sworn to before me this 29th day of August, A. D. 1916.

JAS. H. FRAZIER,

(N. P. Seal.)

*Notary Public in and for
the State of Idaho.*

Filed August 29, 1916. W. D. McReynolds, Clerk,
by Lawrence M. Larson, Deputy Clerk.

(Title of Court and Cause.)

No. 655.

DEMURRER TO AMENDED COMPLAINT

Comes now the defendant and demurs to the amended complaint of the plaintiff heretofore filed herein and for cause of demurrer alleges:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action.

II.

That said amended complaint is indefinite and uncertain in this, that said amended complaint fails to show how or in what manner the defendant was careless or negligent or how or in what manner this defendant allowed the rock and ledge matter in and through which plaintiff was operating drills, and which was situated above and over the head of the plaintiff to become loose and insecure.

III.

That said amended complaint fails to show how or in what manner the defendant failed to perform its duties in inspecting the said place or in notifying the said plaintiff of the fact that the said rock and ledge matter was loose, insecure, unsafe and dangerous.

IV.

Said amended complaint fails to show how or in what manner or by what means the said defendant knew or could have known or by a reasonable inspection could have discovered that the said rock and ledge matter at the place where plaintiff was performing his duties was loose, or unsafe or insecure or in a dangerous condition, or how or in what manner or by what means the said defendant could have ascertained said facts when the same could not be ascertained by the plaintiff after having made a careful inspection of the said back, from which the rock and ledge matter which are alleged to have fallen upon plaintiff came from.

Wherefore defendant prays judgment of this its

amended demurrer that it be dismissed hence with its costs herein sustained.

FEATHERSTONE & FOX,

Attorneys for Defendant,

Federal Mining & Smelting Company.

Residence and P. O. Address, Wallace, Idaho.

Filed Sept. 5, 1916. W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

MEMORANDUM DECISION ON DEMURRER
TO AMENDED COMPLAINT

Nov. 3, 1916.

McFarland & McFarland, *Attorneys for Plaintiff,*

Featherstone & Fox, *Attorneys for Defendant.*

DIETRICH, *District Judge:*

I am inclined to think that the amended complaint substantially meets the views expressed at the time of ruling upon the demurrer to the original complaint, and therefore the demurrer to the amended complaint will be overruled.

Filed Nov. 3, 1916.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

ANSWER TO AMENDED COMPLAINT

Comes now the defendant Federal Mining & Smelting Company and answering the allegations both material and immaterial contained in plaintiff's amended complaint, admits, denies and alleges, as follows:

I.

Admits the allegations contained in paragraphs I and II.

II.

Admits the allegations contained in paragraph III of said amended complaint, but alleges that it was not the sole and only duty of the plaintiff to operate the machine drill, but that it was likewise his duty as such employe of this answering defendant, when required to do so by the nature of his employment, to bar down rock and ore from the walls and roof of the said mine as and when necessity therefore arose, and do such other work in and about the said mine, which is commonly and generally required of miners, as might be or become necessary from time to time.

III.

Answering the allegations contained in paragraph IV of the said amended complaint, this answering defendant denies that it was its duty at all of the times mentioned in the said amended complaint to furnish and provide the plaintiff a reasonably safe place within which to work and especially denies that it was the duty of the defendants at any time to provide a reasonably safe place for the defendant to work in where the character of the place in which the plaintiff was working was created by himself and his fellow-workmen, as also where the plaintiff was engaged in doing a detail of the work; also where the plaintiff was, or ought to have been, engaged in making safe an unsafe place; in this respect this answering de-

fendant further says that at the time of the accident to the plaintiff complained of in said complaint the plaintiff was engaged in the prosecution of a detail of the work under conditions which were constantly shifting and changing by reason of the nature and character and progress of the work and was engaged, or should have been engaged, in making safe a place, *which by the failure of the plaintiff to make and render safe became and was an unsafe place in which to work.* This answering defendant denies that disregarding its duty toward the plaintiff in the premises or any duty which it owed to the plaintiff, it carelessly and negligently, or otherwise or at all, suffered the place in the said Morning Mine where the plaintiff was performing his duties as a miner to become or to remain in a dangerous or unsafe condition, and denies that it carelessly and negligently or otherwise or at all permitted the rock and ledge matter in and through which plaintiff was operating the drills of said compressed air drill or driller, or any other rock which was then and there overhanging the place where the plaintiff was performing his work to become loose and insecure.

IV.

Answering the allegations contained in paragraph V of said amended complaint, this answering defendant admits that while the plaintiff was operating said compressed air drill or driller in drilling through and into the said overhanging rock and ledge matter in the said Morning Mine, the said overhanging rock or ledge matter into which the plaintiff was drilling

gave way, broke loose and fell upon the plaintiff, but denies that in drilling into the said ledge matter, as alleged in plaintiff's said complaint, the plaintiff was engaged in the performance of his duties, but alleges the fact to be that the plaintiff negligently and carelessly drilled into the said rock and ledge matter knowing that the said rock and ledge matter was loose and liable to fall, or having the ability to ascertain this fact by a reasonable inspection which it was his duty to make with tools at his disposal, and in drilling into the said ledge matter without first barring down all loose rock, including the rock which fell, which it was his duty as a miner to do, and in carelessly and negligently failing in securing himself against the danger of the falling of the particular rock which fell. This answering defendant denies that the said rock gave way, broke loose and fell upon the plaintiff without any fault or negligence on his part, but specifically alleges that it fell due and owing to the carelessness and negligence of the plaintiff in failing to guard against its falling and in failing to bar the same down as was required of him by virtue of the duty which he owed to himself and this answering defendant, while in the employ of the defendant. This answering defendant has not information or belief sufficient to enable it to answer as to whether or not about nine tons of the said rock fell upon the plaintiff and therefore denies the said allegation and each and every part thereof and the whole thereof, and this answering defendant says that it has not sufficient information or belief to enable it to answer

whether or not the said or any portion of the said rock remained upon the plaintiff for a period of twenty minutes or any other time or at all, and therefore denies the same. This answering defendant denies that the plaintiff was thereby or at all greatly or otherwise hurt, bruised, wounded or crippled, and denies that the plaintiff was by the reason of the falling of the said rock and ledge matter, or otherwise, greatly injured in his head and his right side or injured in his head or right side at all, and denies that his right foot was greatly or otherwise or at all crushed; and denies that the ligaments thereof were torn or bruised, and denies that the joint of his right foot was greatly or otherwise or at all bruised, sprained and wrenched, and denies that the right arm and shoulder of the plaintiff were greatly or otherwise or at all bruised and crippled, and denies that his back was twisted, wrenched or crippled at all.

V.

Answering the allegations contained in paragraph VI of said amended complaint, this answering defendant denies that by reason of the said injury or any injuries sustained by the plaintiff he has suffered or still suffers any great mental pain or anguish; denies that by reason of the alleged or any injury to plaintiff's head his hearing has become impaired at all; and denies that it is painful for him to eat or to open his mouth at all, and denies that in consequence of the said alleged injuries or any injuries to his right shoulder and arm he has been rendered and is unable to straighten out or

otherwise use his said arm; denies that in consequence of said alleged injury or any injuries received to plaintiff's right foot, he has been and is unable to bear his weight upon the said foot, and denies that he is crippled and lame therein; denies that by reason of the said alleged injuries to plaintiff's back the same has become or is at all greatly weakened, and that at all or at any time the same pains him, and denies that in consequence of all or any of the said alleged injuries the plaintiff is unable to sleep but very little during the night; and denies that his said injuries are so painful or painful at all, that by reason thereof, or any of them, he is kept awake during most of the night or kept awake at all.

VI.

Answering the allegations contained in paragraph VII of said amended complaint, this answering defendant denies that prior to the time of receiving the said alleged injuries the plaintiff did not know or had no means of knowing and by the exercise of due care and diligence could not have discovered the dangerous condition of the place at, in and where he was drilling, and denies that he did not know and had no means of knowing, and by the exercise of due care and diligence could not have discovered that the said rock and ledge matter then and there being above and over him in the said Morning Mine where he was drilling was loose, insecure or otherwise dangerous, but alleges the fact to be that the plaintiff knew or in the exercise of due care, caution and dili-

gence he could have discovered and known that the said overhanging rock and ledge matter was liable to fall, and that it was negligent and dangerous on his part to have drilled into the same.

Further answering the allegations contained in said paragraph VII, this answering defendant admits that the plaintiff commenced his work on the night shift at about the hour of six o'clock on said day, but as to whether or not prior to commencing the said operations of drilling the plaintiff examined or inspected the place in which he was performing his said duties, this answering defendant says it has not sufficient information or belief to enable it to answer and therefore denies the said allegations and each and every part and the whole of them; this answering defendant denies that the plaintiff examined the said overhanging rock and ledge matter with as much care and caution as he was able to exercise. and denies that the plaintiff was not provided with any means for testing the condition of the said overhanging rock and ledge matter; and denies that he had no instrument with which to do so, but alleges the fact to be that ample and sufficient tools, to-wit, picks, and bars were furnished to the plaintiff to test and bar down loose rock; and that it was his duty to make such test and bar down any and all loose rock, including the rock which fell, and this answering defendant denies that the plaintiff did not discover and could not have discovered by the exercise of reasonable care and caution that the said rock and ledge matter was loosened and insecure and liable to fall

upon him; denies that under the terms of plaintiff's employment, it was not his duty to test the condition of the overhanging rock and ledge matter before plaintiff commenced the performance of his duty in the operation of said drill or driller, but alleges the fact to be that it was the duty of the plaintiff to make such inspection and to bar down the said rock or otherwise secure himself against the fall thereof, and denies that this answering defendant negligently failed to make such inspection; denies that the plaintiff prior to receiving the said alleged injuries and prior to the time he commenced the performance of drilling, had a right to believe and did believe that the defendant had carefully inspected and tested the condition of the said overhanging rock and ledge matter, and denies that the plaintiff had a right to believe or assume that the condition thereof was safe; denies that this answering defendant could prior to the time plaintiff received said alleged injuries, by the exercise of ordinary care, caution and diligence, have discovered said unsafe and dangerous condition of said rock and ledge matter in the place where plaintiff was performing his duties; denies that it negligently and carelessly failed to do so, and denies that it carelessly permitted plaintiff to enter upon and continue the performance of his said duties without apprizing, warning, or notifying him of said dangers, but alleges the fact to be that it was not the duty of this defendant to make inspection of the said rock and ledge matter, nor was it the duty of this answering defendant to apprise, warn or notify the plaintiff of the dangers attending said work.

VII.

Answering the allegations contained in paragraph VIII of the said amended complaint, this answering defendant is not advised as to whether or not before sustaining the alleged injuries he was a strong, healthy, able-bodied man of the age of thirty-eight years, and therefore denies the said allegation and each and every part and the whole thereof, but admits that the plaintiff was earning four dollars and a half (\$4.50) per day, and denies that the alleged injuries or any injuries sustained by the plaintiff are permanent and lasting, and denies that the plaintiff will continue to suffer great physical and mental pain in consequence thereof, or any physical or mental pain whatsoever during the remainder of his life or at all; denies that in consequence of said alleged injuries plaintiff's earning capacity has been greatly or at all diminished, and denies that it has been totally or at all impaired.

VIII.

Answering the allegations contained in paragraph IX of the said amended complaint, this answering defendant denies that by reason of the said alleged injuries or any injuries sustained by the plaintiff as alleged in plaintiff's complaint, he has been or is damaged in the sum of fifteen thousand dollars (\$15,000.00) or any sum whatsoever.

Further answering plaintiff's said amended complaint and by way of further, separate and affirmative defenses thereto, the defendant alleges:

That, if the plaintiff was injured as alleged in his said amended complaint, he was injured by and through the negligence of a fellow servant or fellow servants of the plaintiff.

That if the plaintiff was injured as alleged in plaintiff's said amended complaint, he was injured by and through a risk of his employment which he assumed, namely, the risk of the alleged defective condition complained of in his said amended complaint.

That if the plaintiff was injured as alleged in said complaint or injured at all, he was injured by his own negligence and carelessness and contributory negligence in failing to bar down or otherwise secure the place in which he was working, or, in case it was impossible for him to do so alone, then in failing to secure assistance in doing so or in failing to advise his shift boss of such condition, and of the need of assistance in barring down the ground where plaintiff alleged he was injured and in failing to make the same reasonably safe.

Wherefore defendant prays that the plaintiff take nothing by this action, and that the defendant recover its costs herein expended.

FEATHERSTONE & FOX,

Attorneys for Defendant.

Residence and post office address: Wallace, Idaho.
State of Idaho,
County of Shoshone,—ss.

WILLIAM J. HALL being first duly sworn on his oath deposes and says:

That he is the Assistant General Manager of the Federal Mining & Smelting Company, the defendant in the above entitled action, and as such Assistant General Manager is authorized to, and makes this verification for and on behalf of said defendant company, that he has read the foregoing answer and knows the contents thereof, and that he believes the same to be true.

WILLIAM J. HALL.

Subscribed and sworn to before me this 16th day of November, A. D. 1916.

D. R. TREAT,

(Seal.)

*Notary Public for the State of
Idaho, residing at Wallace, Idaho.*

Filed Nov. 18, 1916. W. D. McReynolds, Clerk, by
L. M. Larson, Deputy Clerk.

(Title of Court and Cause.)

No. 655.

VERDICT

We, the jury in the above entitled cause, find for the plaintiff and assess his damages against the defendant in the sum of \$7,500.

J. J. HURM, Foreman.

Filed Nov. 23, 1916,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

JUDGMENT ON VERDICT

This action came regularly on for trial in open court on the 23rd day of November, A. D. 1916, be-

fore the court and a jury of twelve good and lawful men drawn and selected from the Northern Division of this District to try said cause, McFarland & McFarland appearing as attorneys for plaintiff, and Featherstone & Fox appearing as attorneys for defendant, whereupon witnesses were sworn and testified and documentary evidence introduced on behalf of both plaintiff and defendant, and, after the introduction of all of the evidence as aforesaid, the cause was argued by respective counsel, and after argument of said counsel the court instructed the jury; thereupon the jury retired to consider of their verdict and subsequently to-wit, on the 23rd day of November, A. D. 1916, returned into court and announced that they had arrived at and returned their verdict, which said verdict was duly filed and is in words and figures following, to-wit:

*"In the District Court of the United States for the
District of Idaho, Northern Division.*

Louis Anderson,

Plaintiff,

vs.

Federal Mining and Smelting Company, a corporation,

Defendant.

No. 655.

VERDICT

We, the jury in the above entitled cause, find for the plaintiff and assess his damages against the defendant in the sum of \$7,500.00.

J. J. HURM, Foreman."

And thereupon said jury was duly polled, and each of said jurors was asked if said verdict of Seventy-

five hundred dollars was his verdict, and each and all of them replied that it was.

Now, Therefore, by reason of the law and the premises and the verdict aforesaid, it is hereby *Ordered, Adjudged and Decreed* that Louis Anderson, the above named plaintiff, do have and recover of and from Federal Mining and Smelting Company, a corporation, the above named defendant, the sum of Seventy-five hundred dollars (\$7500.00), together with plaintiff's costs and disbursements necessarily incurred herein, and taxed in the further sum of Sixty-five and 20-100 (\$65.20) dollars, which said sums are to bear interest at the rate of seven per cent per annum from the date hereof.

Dated this 24th day of November, 1916.

Filed Nov. 24, 1916,

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 655.

BILL OF EXCEPTIONS

Be It Remembered, That heretofore, and on, to-wit, the 23rd day of November, A. D. 1916, being one of the days of the November Term of the District Court of the United States for the District of Idaho, Northern Division, before the Honorable Frank S. Dietrich presiding as Judge of said Court, and a jury, this cause came on for trial on the pleadings heretofore filed herein, Messrs. McFarland & McFarland appearing for the plaintiff, and Messrs. Featherstone & Fox appearing for the defendant, and thereupon

the plaintiff, to maintain the issues on his part, introduced the following evidence, to-wit:

Mr. R. E. McFarland, one of the attorneys for the plaintiff, made the following statement to the Court, to-wit:

If the Court please, this plaintiff does not talk plain. He can't understand the English language. I can't understand him when I am talking to him, and I have found it necessary to have an interpreter, and I have brought Mr. Raley here, to ask that he be permitted to interpret for us. I will state that Mr. Raley interprets up in Judge Wood's court, and he did it this last term in a case in which I appeared. I would like to have him sworn. I understand that Mr. Fox also has an interpreter, and I have no objection to his interpreting for him. I would like to ask that Mr. Raley interpret for my witness.

Whereupon Mr. Fox, one of the attorneys for the defendant, made the following statement to the Court, to-wit:

If the Court please, my information is to the contrary, that this witness can talk perfectly good English. He was employed in the mine there, and can talk very plain.

Thereupon Mr. McFarland made the following statement to the Court, to-wit:

I know he can't, and I have an interpreter, Your Honor.

Thereupon the Court made the following statement, to-wit:

Well, we will try it; he may be sworn.

Whereupon, LOUIS ANDERSON, the plaintiff, was called, sworn and examined in the English language, and testified in said language in answer to questions propounded to him during his entire examination, both direct and cross, and without an interpreter, as follows, to-wit:

DIRECT EXAMINATION by

MR. McFARLAND:

Q. What is your name?

A. Louis Anderson.

Q. Where do you live?

A. Mullan.

Q. How long have you lived there?

A. I have lived there about,—next spring it is two years.

Q. What is your business?

A. Miner.

Q. How long have you been mining?

A. What mine do you mean?

Q. How long have you been mining altogether?

A. About eighteen or nineteen years.

Q. In what capacity? What kind of work have you done in mines?

A. I was doing the last fifteen years running a machine.

Q. You have acted as a machine man for fifteen years?

A. Yes, sir.

Q. In what mines have you worked in the Coeur d'Alenes?

A. In the Morning.

Q. What other mine?

A. That is all the mine I worked in in the Coeur d'Alenes.

Q. Have you worked there fifteen years?

A. No, not there, but in the United States.

Q. Where else besides the Coeur d'Alenes have you worked in a mine as a machine man?

A. I worked in Michigan, around Kerserg.

Q. How old are you?

A. Thirty-eight.

Q. When did you first go to work for the defendant, the Federal Mining and Smelting Company? When did you first commence to work for the Federal Mining and Smelting Company?

A. I can't understand just exactly what you mean.

Q. When did you first go to work in the Morning mine?

A. In 1915 when I first gone to work.

Q. What month?

A. I couldn't tell you what month; it was in the spring time any how.

Q. Had you worked there up to the time you got hurt?

A. Yes.

Q. What kind of work were you doing in the mine all of that time?

A. In the Morning mine?

Q. Yes.

A. Machine man.

Q. Explain to the jury what a machine man does in a mine, and what kind of a machine he uses.

A. I used a buzzer. I don't know; it has got another name, but they call it a different name.

Q. Tell the jury what kind of a machine that is, and what is done with it in a mine.

THE COURT: What do you do with the machine? How do you operate it?

MR. McFARLAND: Show the jury what you do with that kind of a machine.

A. Just make a hole straight up, just a little bit on an incline.

Q. What makes that hole?

A. The steel in the drill.

Q. The steel that is put in this drill or driller, is that what you call it?

A. Yes, the drill.

Q. How is that machine run?

A. Just got a hammer inside, and that hammer, knock the end of the steel, and then in about six inches, when the steel gone in there, and then take the steel, and you got a handle and turn, and the machine looks like a pipe something, an air pipe, and something like that, but take about four inches, maybe in some places it might be a little more, and then turn it by hand like that, holes around, the hammer and the drill, and put down against and bored.

Q. I will just ask you, is that machine run by air?

A. Yes, it is run by air.

Q. What are these holes made up in the mine for? What do you put these holes up in the mine for?

A. They are blasted out, take the ore out.

Q. Now, on the 8th day of May last were you

working there in the Morning mine of the defendant?

A. What is that?

Q. On the 8th day of May last were you working in the Morning mine, for the defendant?

A. Yes.

Q. What time did you start to go to work that day?

A. That was in the afternoon, when I started to go, about half past three.

Q. What did you first do when you got into the mine? Tell the jury what all you did when you first went into the mine that day?

A. I got the machine, and look around in the places, if it is safe, and you have got to look that over when the muckers come, and if you see it loose you have got to take it down.

Q. What did you do that morning? Did you find any tools?

A. No. I couldn't find the right kind of tools, what I used.

Q. What kind of tools was used for knocking down the rock or testing the inside of the mine?

A. With a bar.

Q. What kind of a bar was that? How long and how big?

A. Some bars are a little longer and some shorter. You have to use it, this kind of a bar, a high place you have got to get a long bar, and in low places you have got to get a short one.

Q. Did you find a bar there that night?

A. No.

Q. Did you find your drills as soon as you went into the mine?

A. I find a pick on the side there and some steel there, and that is all the tools I have.

Q. Did you do anything towards testing the mine to see if it was safe?

A. I was barring down the loose. I was looking for a bar first, but I couldn't find the bar, and the muckers was working pretty close, and I take a piece of steel and a drill and take them down, and the muckers can work. Then I thought I work to the place for the bar, but I was afraid the loose come down, and might be hurt, and I would get the loose down with a bar and pick and them tools that I had, and I couldn't,—my machine—looked for the bar around, and I couldn't find the bar, and I come back to the machine, and I thought I try to take that machine and feel if the place was safe. I take the pick and bar and make it as safe as I could, but I aint sure that place is safe yet. I take the machine, and I put the steel in and start her and drill just a little bit with the air, with that hammer, what used to be trying the steel, when they make the hole, but just a little bit, and just when I feel with my hand that steel, and put my other hand at the roof and feel, and come in that little air and work that machine, and can't make that loose rock,—you know when rock is loose or not,—you can find out that way, some big loose,—it is pretty hard to find the back loose there, three or four feet big, it is pretty hard to find

out with a bar, but you put this steel and the drill, and give it just a little bit of air, when the machine start to work, and you put another hand in the roof and the rock, and feel it, and you can feel that, whether it is loose or not. But the shifter come at the same time—

Q. What was his name?

A. Brown.

Q. What was his first name, do you know?

A. I couldn't say exactly what it is.

Q. How long had he been shift boss in that mine?

A. I couldn't tell you. He was shift boss before I come in the mine.

Q. Before you went in there?

A. Yes.

Q. What did your shift boss tell you?

A. The shift boss asked me if I aint doing nothing here. I says yes, I was barring down the loose, and I couldn't find no bar, and I looked for a bar but couldn't find them; I had the pick and tools I had there, and I take it as I come.

Q. What else did he tell you?

A. He said never mind that, that is all right, and start to work and get them holes drilled, and get the holes ready to blast tonight.

Q. Did he say anything to you about whether he had tested it himself?

A. No. He said he found out that the place was all right.

Q. He said he had found out that the place was all right?

A. Yes.

Q. What did you do when he told you that?

A. I started to drill, when he said that place is all right, started to drill and work.

Q. How long did you drill before you got hurt?

A. I think I drilled not more than ten minutes; I couldn't tell you.

Q. Then what happened?

A. Then all the roof come down.

Q. Do you know about how much rock fell, or could you tell?

A. It is pretty hard to tell.

Q. Did it fall on you, this rock fall on you?

A. Yes, the rock fell right on top of me.

Q. Did it hurt you?

A. Why, yes.

Q. Where did it hurt you? Tell the jury, so the jury will know this.

A. It hurt my right side, my shoulder, and I couldn't do the work.

Q. Tell the jury where else it hurt you, if any other place.

A. And it hurt my foot and my back and my head, and I couldn't hear with this ear hardly at all. And make my head ache. I move my arm a little more and it gets sore, that way, and make my head sore. And I couldn't sleep at night, after I had been hurt. It makes me nervous. I dream and I couldn't sleep, sometimes I couldn't sleep before morning, daylight, come.

Q. When you were hurt did you go anywhere, or

was you taken anywhere, right after this rock fell on you? What was done with you?

THE COURT: Did you go to a doctor or a hospital?

MR. McFARLAND: Q. Did you go to a doctor or a hospital, or anywhere?

A. I come,—took me to the hospital, out of the mine.

Q. Two men took hold of you, did they? Two men took you out of the place from under the rock?

A. No.

Q. Well, when this rock fell on you did anybody take the rock off of you?

A. Yes.

Q. Go on and tell the jury all about that.

A. Well, I couldn't explain—

THE COURT: Yes, you are doing very well. Just go on and tell the jury what you did.

MR. McFARLAND: Q. Did two men get you up from under the rock?

A. Yes.

Q. Then what did they do with you, what did they do?

A. I think it was more than two men. I didn't see nobody. Some time I hear somebody work on top of me. I couldn't see anyone. I was buried under the muck. I couldn't see nobody, but I hear somebody working on the top of me.

Q. Where did they take you then? Did they take you out of the mine?

A. Yes, they take me out of the mine.

Q. Where to?

A. To the station first, and then put me on the truck and take me out to the foreman's office there, when I see it first done.

Q. And then where did they take you from the foreman's office?

A. They take me to the hospital.

Q. What hospital?

A. The Sisters Hospital, in Wallace.

Q. How long were you there in that hospital?

A. Well, I don't remember just exactly. I was pretty sick when I left the hospital; I don't remember; about ten or twelve days, I think; and I feel pretty bad yet when I left the hospital.

Q. Have you had a doctor to treat you?

A. In the hospital?

Q. Yes, and since you have come out of the hospital?

A. Yes.

Q. What doctor did you have?

A. Mowry.

Q. How long has he been treating you for your injuries? How long has he been doctoring you?

A. Right along all the time.

Q. What did he do for you?

A. He give me electric, around here in my shoulder and my arms.

Q. Did he give you any medicine?

A. He give me liniment.

Q. Did he give you any medicine to take inside?

A. Yes, about three months, or two months ago;

I was sore here, with a big lump here (indicating).

Q. A big lump in the stomach?

A. Yes, and I told the doctor I don't know what is the trouble, and I find it is come out, and I had two bottles of medicine, but never get no better yet, get worse all the time.

Q. How long did he keep up this electric treatment, Doctor Mowry?

A. Just about five minutes, something like that.

Q. How long,—ever since that time? When did you go to Dr. Mowry last to be doctored?

A. Last Sunday I was there last.

Q. How often have you been going there for him to treat you?

A. Every ten days.

Q. Every ten days?

A. Yes, sir.

Q. Were you ever hurt before this time? Were you ever hurt before you got hurt in this Morning mine?

A. No, sir.

Q. Was you in good health or poor health, or how was your health, before you got hurt?

A. Good.

Q. Was you ever sick any?

A. No.

Q. How did you lose your eye?

A. That was small pox.

Q. When was that?

A. I don't remember. I was a little kid. My mother told me it was the small pox that I lose that eye, —about two or three years old.

Q. You say you haven't been able to hear good since you had this accident,—you can't hear so well out of one ear?

A. No.

Q. You may tell the jury if you have any pain, and, if so, where, after this accident.

A. I don't understand just what you mean.

Q. Well, did your wounds or injuries hurt you much? You understand you got hurt in the mine. Now did those places where you were hurt, hurt much, make you feel bad, pain?

A. Sure.

Q. Where,—tell the jury every where.

A. In my shoulder and my arms and my back and my foot, right hand.

Q. How about your head?

A. Yes, and my head.

Q. And about your stomach?

A. My stomach.

Q. Did it affect you when you went to eat? Did your mouth hurt when you went to eat?

A. Yes, and I had,—sometimes when I eat hard bread or something, and I open the mouth a little more, it hurts right there, the cut right there, it hurts right there (indicating), and I bite a little harder and it would hurt.

Q. How did your hurts affect your sleep? How did your hurts affect your sleep? Could you sleep good after that?

A. No.

Q. How much were you earning up to the time that you got hurt, Louis?

THE COURT: How much a day were you getting, how much pay?

A. The day when I was working?

THE COURT: Yes.

A. Four and a half.

MR. McFARLAND: Q. Have you been able to work since that time?

A. No.

Q. Can you work now?

A. No, sir.

Q. Now, when you went into the mine to go to work that night, was there any holes left up there that had been bored, any holes up in the mine, when you first started to work?

A. Yes, there was two holes there already, and one started, but the steel stuck in the hole, and they started another hole close to it.

Q. Did you bore those holes, or did somebody else?

A. Not one hole.

Q. What had been the custom there in the mine about leaving holes already drilled that way for the next shift?

A. I couldn't understand.

THE COURT: Why is that material, Mr. McFarland?

MR. McFARLAND: I don't see that it is Your Honor. Only as a matter of precaution I asked it, Your Honor.

Q. From your experience as a miner, I will ask you to state whether your drilling in the mine there caused that rock to fall on you?

A. I can't understand that.

MR. FOX: Ask him why the rock fell.

MR. McFARLAND: Why did the rock fall down on you? What made the rock fall down on you?

A. That is more than I know. It must be loose; it can't come down when it aint loose.

THE COURT: Now ask him whether he made it loose by drilling.

MR. McFARLAND: Q. Did you make it loose by drilling?

A. No.

MR. McFARLAND: You may inquire.

CROSS EXAMINATION by

MR. FOX:

Q. You say, Louis, that you didn't make it loose by drilling?

A. It must be loose before.

Q. It was loose before?

A. Yes, that is, it was loose before. If it was solid it would never come down.

Q. But you drilled into this rock that fell, didn't you?

A. Yes, I drill that time.

Q. You drilled right into the rock that fell?

A. Yes.

Q. And you mean to tell the jury that though the rock was loose before it fell, still you didn't help make it looser by drilling into it?

A. It wasn't loose from what I drilled.

Q. Your drilling had nothing to do with breaking it down, is that it?

MR. McFARLAND: I think he has answered that twice.

THE COURT: You will have to put your questions in a very direct way.

MR. FOX: I will, if Your Honor please.

Q. Now, Louis, when you go into the Morning mine, when you start to work there, you get a copy of the rules, don't you, the mining rules there?

A. What rules do you mean?

Q. The mine rules, telling you what you must do underground, don't you?

A. I don't see any.

Q. You never saw the rules, is that it?

A. No. I didn't know what the mining rules was.

MR. FOX: Mark this for identification, please.

A certain paper was thereupon marked DEFENDANT'S EXHIBIT NO. 1.

Q. Now I show you, Louis, a piece of paper marked Defendant's Exhibit No. 1. Just look at that.

A. I couldn't read it.

Q. You can't read it?

A. No, sir.

Q. Do you know your signature when you see it?

THE COURT: Your name.

MR. FOX: Q. Do you know your name written when you see it, when you write it yourself?

A. I didn't write it.

Q. Did you write that? Just tell the jury whether you wrote that or not.

A. Yes, that is my hand; I wrote that, yes.

Q. Did you write underneath that also, "I understand these rules, Louis Anderson."?

A. How could I write? I can't write.

Q. You never wrote that?

A. They put my paper like that and put your name there, and they didn't say anything else.

Q. You wrote your name there?

A. Yes.

Q. But you didn't write, "I understand these rules"?

A. How could I write if I don't know.

Q. Did you write there, "I understand these rules"?

A. Yes.

Q. You wrote that there, did you?

A. Yes.

MR. McFARLAND: He doesn't understand you.

MR. FOX: Yes, he does understand me.

A. The office had, somebody else write just the same as here, and the office man told me that, told me to write that way, and I write that here.

Q. But you wrote it there?

A. Yes, I wrote it. There was another slip there in the office, and they give me another slip, and somebody else write it just the same, just there, and copy, I would write it that way. I didn't know that to write myself.

Q. Did you write that?

A. I write it.

Q. You wrote that?

A. Yes, sir.

Q. They gave you a copy of these rules, didn't they?

A. This here?

Q. Yes.

A. Yes.

MR. McFARLAND: Let me look at that.

MR. FOX: I haven't offered it yet. I may never offer it.

THE COURT: Let us proceed in order. It isn't necessary that you see it at the present time Mr. McFarland.

MR. FOX: Q. Louis, isn't it a fact that the man in the office who gave you a copy of these rules asked you if you understood them?

MR. McFARLAND: We object to that as not proper cross examination, and not material at this time, and, if material at all, it is part of their defense. This witness hasn't been interrogated upon this subject or any kindred subject.

THE COURT: Overruled.

(Last question read.)

THE COURT: Answer the question, Mr. Anderson. Did you understand the question?

MR. FOX: I will ask him again.

Q. Isn't it a fact that the man in the office who gave you a copy of these rules asked you at the time he gave the rules to you whether you understood the rules?

A. I can't understand just what you said, and I couldn't tell you either what—

Q. Did you have any talk with the man in the office when you went to work?

A. Yes, I talked to the man.

Q. Did he ask you whether you understood these rules?

A. No.

Q. He didn't?

A. No, he didn't ask me.

Q. Now you say you have been mining for sixteen years?

A. Yes.

Q. In the United States?

A. In the United States, yes.

Q. How long have you mined in the Coeur d'Alenes? How long have you been up there in the Coeur d'Alenes?

A. That is the first mine I worked in, in the Morning.

Q. How many months did you work in the Morning?

A. I couldn't tell you exactly, but I think about a year; it might have been a little more or a little less.

Q. On what floor or level were you working?

A. On the sixteen hundred.

Q. On the sixteen hundred level?

A. Yes, sir.

Q. And what floor from the sixteen hundred?

A. On the eighth floor.

Q. How long had you worked on the sixteen hundred level?

A. About three or four months, I guess.

Q. In other words, you had worked, doing this same character of work that you were doing on the

day you were injured, you had worked at that for three months, had you?

A. Yes, between two and three months.

Q. In the same place?

A. No, not in the same place.

Q. Well, in that immediate vicinity, right in that neighborhood, and near where you got hurt?

A. I couldn't understand that.

Q. I will withdraw the question. You worked for three months near the place where you got hurt, did you?

A. I couldn't—

Q. Where did you work for the last three months before you were hurt?

A. I was working in fourteen before, until I moved to sixteen.

Q. And you worked on the sixteen hundred foot level for three months, did you?

A. Yes, I guess about two or three months, something like that.

Q. What were you doing on that level during that time?

A. I was doing machine work, drilling.

Q. When you went to work in the Morning mine you hired yourself out as an experienced miner, didn't you?

A. Yes, sir.

Q. You told the foreman that you knew all about the duties of a miner, or a machine man, underground?

A. Yes, sir, and I know too.

Q. And you did know the duties of a machine man underground, did you?

A. I knowed it, yes.

Q. You know the duties of a machine man under the customs in that mine, the first thing he must do is to bar down?

A. Yes, sir.

Q. And when you went on shift that day you knew the first thing you must do was to make your place safe by barring down, isn't that correct?

A. That's right.

Q. Now, as a matter of fact, Louis, these tools that you speak of, these picks and these bars, are used by the miners for the purpose of making the place safe, aren't they, these picks and the bars, they are used to make the place safe?

A. Yes.

Q. And the miners use them, don't they?

A. Yes.

Q. And these picks and these bars are in the stopes, aren't they? The picks and the bars are in the stopes, aren't they?

A. Not at that time.

Q. There were no picks and bars in that stope?

A. No, not at that place.

Q. How big was the place where you were working, that is, how long was it, and how high was it?

A. That stope?

Q. The particular place where you were working, how high was it?

A. Right on the floor?

Q. How high from the muck pile?

A. About six feet on the muck pile, about six or seven feet.

Q. In other words, you were taking the second cut, is that it?

A. Yes.

Q. The first cut had been taken by the shift previous?

A. I couldn't understand.

Q. There had been some ore shot down there, hadn't there?

A. Yes, sure.

Q. There was a muck pile there?

A. Yes.

Q. How high was the muck pile?

A. Well, it might be six or seven or eight feet.

Q. And you set your machine up on top of the muck pile?

A. Yes.

Q. And then you started to drill in the top or the back, as the miners call it, didn't you?

A. Yes.

Q. And the top, the back or the top, or the roof, there, was six feet from the top of the muck pile, where your machine stood, about six feet?

A. About five or five feet and a half.

Q. It was so low that a man had to kind of stoop so he wouldn't touch the top, you had to kind of stoop over so you wouldn't touch the top with your head?

A. I could touch the top with my hand.

Q. You could touch the top with your hand?

A. Yes.

Q. Easily?

A. Yes.

Q. How big was this rock that was there and was loose and came down, how big a piece was it?

A. I couldn't tell you; I didn't look at it at all.

Q. When you went in there you didn't look at it at all, is that it?

MR. McFARLAND: He didn't say that.

MR. FOX: Yes, he did.

Q. I will ask you, did you look at the rock when you went into the stope?

THE COURT: What rock?

MR. FOX: This rock that came down, if Your Honor please.

A. I don't know. All the back came down.

Q. Did you look at the back at all?

A. When I went to work?

Q. Yes.

A. Sure.

Q. Did you try to bar down?

A. Yes.

Q. Did you bar down?

A. I barred down.

Q. What did you bar down?

A. I barred down the loose.

Q. Barred down the loose rock?

A. The loose rock.

Q. When you set to work under this rock that came down you said you set to work there to try to find out whether the rock was loose or not?

A. Yes.

Q. And you put your hand up against the rock, did you?

A. I didn't have time to put my hand yet. I had just put the air on the machine, and I see the shifter come around.

Q. That was Mr. Brown?

A. Yes, that was Mr. Brown.

Q. As a matter of fact, when Mr. Brown came through there he said to you, "Louis, this ground is bad; you want to bar it down." Isn't that what he said to you?

A. Who?

Q. The shifter, Brown, said to you, "Louis, this ground looks bad; you want to bar it down", or words like that?

A. No.

Q. He didn't?

A. No.

Q. Nothing like that at all?

A. No.

Q. And you then said to him, "This is all right; if it comes down I am out of the way of it; it won't hit me," isn't that what you told him?

A. I didn't understand.

Q. Didn't you then tell him that "If this slab or if this rock comes down it won't hit me; I am out of the way of it," isn't that what you told him? You understand that, don't you?

A. I couldn't understand what you mean.

Q. Didn't the shifter tell you that that was bad ground you were working under?

A. No.

Q. He did not?

A. No.

Q. Didn't you then tell him that the ground was all right where you were working?

A. Who tell him?

Q. Didn't you tell the shifter that?

A. No.

Q. Didn't you tell the shifter that if any part of it came down you were out of the way so it wouldn't hit you? Didn't you tell that to the shifter?

A. No, sir.

Q. Do you know Oscar Berg, Oscar, the timberman there?

A. They call him Andy.

Q. You know Andy Berg?

A. Yes.

Q. He was a timber man there?

A. Yes.

Q. He came through there while you were drilling, didn't he?

A. Yes, sir.

Q. Didn't Andy tell you to bar that down, that you were in a bad place?

A. No, sir.

Q. And didn't you tell Andy the same thing, that if it came down it wouldn't hit you?

A. No, sir.

Q. You didn't tell Andy that?

A. No.

Q. Now, Louis, suppose there is bad ground there,

suppose you found a loose rock, and you can't bar it down, what do you do? What does the machine man do when he can't bar down the ground?

A. He has to get the timber man and put a sprag or something else in to hold that up.

Q. And when a miner finds that a piece of ground is loose and is too big to bar down, he goes and gets the timber man to help him put in the sprag?

A. Yes.

Q. There are plenty of sprags around through the stopes, aren't there?

A. Yes.

Q. You have done that lots of times yourself? You have put sprags in lots of times yourself?

A. Yes, sir.

Q. Up in the Morning mine?

A. Yes.

Q. Did you ever blast a big boulder down with dynamite?

A. Yes.

Q. They keep dynamite on the sixteen hundred foot level for that purpose, don't they?

A. Yes.

Q. There is plenty of powder down there on the sixteen hundred for the miners?

A. Yes.

Q. And the machine man goes down and gets a stick of powder, and during the noon hour blasts it down, don't he?

A. Sometimes they do that, yes, when he sees the wall, put the powder, and he can get it out and

blast it, no crack, he couldn't put no powder in no crack or nothing.

Q. There was no crack there at all?

A. No.

Q. There wasn't anything to show you about this rock, that it wasn't safe, is that what you mean? You, as a miner, couldn't tell that the rock wasn't safe?

A. I got no time to find out yet; I wasn't sure yet.

Q. Did you go down to the next floor to get a bar?

A. Yes, I was down on the next floor; it might be the third floor. I was down to the track too.

Q. And in all those eight stopes there you couldn't find a bar, is that correct?

A. No.

Q. There are no bars in that mine, in other words?

A. There might be bars some place, but I couldn't find them.

Q. Did you ask anyone for a bar?

A. I don't remember. I hurry up and look for a bar, and it might be I ask them.

Q. How many men went in on your shift? How many men went into the mine on your shift?

A. I couldn't say.

Q. Were there more than three?

A. Sure.

Q. More than ten?

A. Sure.

Q. More than thirty?

A. There might be a hundred.

Q. As a matter of fact, about a hundred and fifty men go in on your shift, don't they?

A. Yes.

Q. And a great number of these men, probably fifty or sixty, work on the sixteen hundred, don't they?

A. Who?

Q. About fifty or sixty men work on the sixteen hundred, don't they?

A. No, I don't think that much.

Q. How many,—thirty?

A. There might be twenty-five or thirty, something like that.

Q. And the machine men were doing the same kind of work you did?

A. Yes.

Q. And they too need bars, they have got to have bars too, don't they?

A. Sure, supposed to do that.

Q. Did you know any other machine men that worked there?

A. Yes.

Q. Did you know any other muckers that worked there?

A. Yes.

Q. Did you go to these men and find out if there was a bar around?

A. I couldn't remember if I asked anybody; I looked around, and it might be I asked them; I couldn't tell you.

Q. Did you go to the seventh floor? You worked on the eighth floor?

A. Yes.

Q. Did you go to the seventh floor?

A. Yes.

Q. And couldn't find a bar?

A. No.

Q. Did you go to the sixth floor?

A. Sixth?

Q. Yes.

A. No. There is nothing to the sixth floor; nobody work on the sixth floor.

Q. Was there anybody working below the sixth floor?

A. It might be, close to the shaft, on the sixth floor. That is far away.

Q. Were they working right beneath you on the fifth floor?

A. No.

Q. They were only working there on the seventh and eighth floors?

A. Seventh and eighth, and right there where I was working.

Q. And you went all over the seventh and eighth floors, did you, to find a bar?

A. Yes.

Q. And you couldn't find a bar?

A. No.

MR. FOX: That is all.

MR. McFARLAND: I believe that is all for the present for this witness.

THE COURT: Gentlemen of the Jury, during this intermission of the court and any others that may take place during the trial of this case, be care-

full to keep yourselves free from any improper influences while you are out of the court room. Don't overhear any discussion in this case and don't enter into any discussion, even among yourselves, until it is finally submitted to you. I will excuse you until two o'clock.

An adjournment was thereupon taken until two o'clock P. M., Thursday, Nov. 23, 1916.

2 P. M., Thursday, Nov. 23, 1916.

LOUIS ANDERSON, heretofore duly sworn in his own behalf, upon being recalled, testified as follows:

DIRECT EXAMINATION by

MR. McFARLAND:

Q. From whom did you take your orders when you were working there in the Morning mine? Who told you where to work and when to work and what to do?

A. You have to know yourself the place.

Q. I mean who told you where to work?

MR. FOX: Just let him finish his answer. He says you have to know yourself.

MR. McFARLAND: Q. What did this man Brown have to do, this shifter or shift boss there, what did he have to do?

A. He have to tell the men where to work and what to do.

Q. Did he tell you what to do and where to work?

A. Yes, sir.

Q. All the time that you were working there?

A. Yes.

Q. Now, just before you was hurt did he tell you that he had tested the roof?

MR. FOX: That has already been gone into, if Your Honor please.

MR. McFARLAND: No, I don't think so. It isn't clear in my mind. This witness was talking pretty fast and I couldn't understand everything he said, and I don't think the jurors could either.

THE COURT: Yes, that has been gone into, Mr. McFarland. He stated what Mr. Brown said to him.

MR. McFARLAND: Q. Did anyone tell you that that place where you were working was dangerous?

MR. FOX: I object to that as incompetent, and not proper, if Your Honor please. It doesn't seem to require that anybody said anything, should tell him.

THE COURT: Overruled.

MR. McFARLAND: Q. Did anybody tell you that where you was working was dangerous?

A. What does "dangerous" mean?

Q. Not good, bad.

A. No.

Q. Did anyone tell you that that rock was loose?

A. No, sir.

Q. You told Mr. Fox that you didn't have time to test, to examine and test the rock overhead.

A. Yes, I told him.

Q. Why didn't you have time?

A. Brown cut my time.

Q. How did he cut it?

A. When he tell me hurry up and get your holes and blast.

Q. If you had had time to test this place could you have found out that that rock was loose?

A. Yes, sir.

Q. Did you know that that rock was loose?

A. No, sir.

Q. Did you take Mr. Brown's word for it that everything was all right?

MR. FOX: I object to that as incompetent, irrelevant, and immaterial, whose word he took for it. That is not the proper way to get at it.

THE COURT: Objection sustained.

MR. McFARLAND: Q. Did you believe what Mr. Brown told you when he said that he had examined it, and everything was all right?

A. Yes, I believed him.

MR. FOX: I move that the answer be struck out, because it isn't shown that he had any right to rely upon such assurances.

THE COURT: The motion is denied.

MR. FOX: An exception. We are allowed, Your Honor, exceptions, without—

THE COURT: Yes, exceptions will be allowed to all adverse rulings.

MR. McFARLAND: Q. Could you, without a test or an examination, tell that the rock was loose?

MR. FOX: He has already answered that question. He said he could have.

A. Yes, but I have not the time.

MR. McFARLAND: Q. By just looking at it—could you tell without testing?

A. No.

MR. McFARLAND: That is all.

CROSS EXAMINATION by

MR. FOX:

Q. In order for you to find out that the ground was bad you had to test it, didn't you, it was necessary to test the ground?

A. To find out?

Q. To find out whether it was bad ground or good ground?

A. Yes, sir.

Q. How do you do that testing?

A. I can take the bar or anything, a piece of steel, and pound it, and find out how it sound. You can find out that. It is pretty thick and loose, and you can find out with a drill, putting a little air on it, not another machine, but with a bizzer machine, and with a hammer and the steel.

Q. Never mind about that.

A. You can go around and look at it, any crack or anything else, and find out how you are working, far away, all around.

Q. If you see a crack in the rock overhanging you, in which you are going to drill, you know that rock is dangerous, don't you?

A. Yes.

Q. These bars that you test the ground with are long pieces of steel, anywhere from four to eight or nine feet long, aren't they?

A. It is pretty hard with a long steel, pretty hard to know that, but with a short piece of steel and a bar or anything else.

Q. How long a piece of steel would it take to test this ground you were working on?

A. Just about two feet. I can judge the ground with my hand.

Q. And if you take a bar and hit the ground with a bar, a miner who is a good miner can find out whether the ground is loose?

A. Yes.

Q. You can also tell, if you put your machine on there, and start to drill in it, whether it is loose, can't you?

A. No, you can't drill it out. You have to take the bar and take that piece down.

Q. The miner does that?

A. Yes, the miner does that.

Q. Now, suppose that you don't test it with a bar, but you use a drill, you can tell by the sound of it whether the ground is loose, can't you?

A. Yes, sir.

Q. And that is the only way you can test that ground, isn't it, by looking at it, by sounding it with a bar, or by using your drill and drilling in it, that is the only way?

A. Why, and looking around, any crack or slab, or anything else, looking all around, you can find out when you have got a crack, and any slit, how far it is.

Q. And a good miner can always tell that?

A. Yes.

Q. Usually tell whether the ground is safe?

A. Yes, I can tell it, if I have enough time.

Q. What I am trying to get at is this,—if there are no cracks in the ground, the only way a good

miner can tell whether the ground is good ground or bad ground is to test it with a bar he has in his hands, or to test it with a machine drill, by starting in to drill on it, is that correct?

A. Yes.

Q. When you are working in a stope like this you are drilling up sometimes, aren't you?

A. Yes.

Q. And that is the usual way of doing it, drilling up into the back or the roof with machines?

A. Yes, sir.

Q. And the miner has his machine set up right under the ground, with the drill sticking in the top of it?

A. Yes.

Q. And this drill moves up and down and makes the holes in the top?

A. The legs of the machine—

Q. These little machines—

MR. McFARLAND: Wait a minute. He hasn't finished his answer there.

MR. FOX: Go ahead.

A. The steel don't move in the machine. The machine come up the same as you make the hole.

Q. The whole machine moves?

A. Yes. It is the tail and legs, what you call it, put on down below, they raise up, and the machine coming up, and you get the whole machine going up too, at the same time the steel move up.

Q. These little machines are built of a piece of pipe about a foot or so long, into which the air is pumped, isn't that right?

A. Yes.

Q. And this air comes in contact with the steel, and that forces the steel up against the back?

A. Yes.

Q. And these little machines are set on a kind of a leg, or legs, aren't they, standing on little legs?

A. No.

Q. How are they fastened to the ground?

A. Just a little piece, about an inch thick, or maybe a little more, when that is coming up, but I couldn't tell you.

Q. That is perfectly clear. And the miner stands right under the ground that he is drilling in? The miner has to stand or sit under the ground in which he is drilling?

A. Yes, sure.

Q. Now, every miner knows that this ground into which he is drilling is liable to come down, or part of it is liable to come down at any time, doesn't he?

MR. McFARLAND: We object to that as not cross examination, and calling for the opinion of the witness as to what every miner knows.

THE COURT: Do you mean the likelihood or the possibility? I ask that because this witness perhaps doesn't make fine distinctions between words. Do you mean it is a mere possibility?

MR. FOX: No; the ground comes down not infrequently under those conditions.

THE COURT: Yes, but you say it is likely to come down.

MR. FOX: Well, it may come down.

THE COURT: I think I shall sustain the objection, in the form in which it is.

MR. FOX: I will re-frame the question.

THE COURT: You may ask what his experience or observations have been.

MR. FOX: Now, in your experience as a miner—

A. Yes, sir.

Q. During the time you have been a miner—

A. Yes.

Q. When you have drilled in the back with one of these machine drills, you have observed rock falling down, haven't you?

A. When I was drilling?

Q. Well, at other times rock has come down by reason of your drilling it, hasn't it?

A. I can't understand what you mean.

Q. I will withdraw the question. You have drilled this way before, haven't you?

A. Yes, sir.

Q. In the back?

A. Yes, sir.

Q. Did any rock ever come down before when you were drilling?

A. Why, just that dust come down in the hole, make the hole as it come down.

Q. But haven't you seen rock come off the back?

THE COURT: Big pieces of rock, do the big pieces fall down?

A. No, I didn't see none.

Q. You never have seen any rock falling down?

A. Yes, some time I see it, some places it might be falling down on the side.

Q. And sometimes they fall down from the back, don't they?

A. Sometimes they crack, and a little piece will come down right along.

Q. Come down right along?

A. Yes.

Q. And if the ground isn't properly tested it is liable to come down in large pieces, isn't it?

MR. McFARLAND: We object to that. That seems to be a self-evident fact.

THE COURT: Yes.

MR. FOX: Well, under that statement of counsel I think that is all right, that it is a self-evident fact.

Q. You say that Mr. Brown told you what to do?

A. Yes.

Q. Where did you first see Mr. Brown that morning?

MR. McFARLAND: That wasn't in the morning. I object.

MR. FOX: Q. That day, when you went on shift there?

A. When he come in the carbide office.

Q. That is at the mouth of the tunnel, isn't it?

A. Yes, sir.

Q. Just before the shift is taken into the mine on the car?

A. Yes.

Q. And he goes into the mine with you? He went into the mine with the shift?

A. Yes, the same trip.

Q. Did he go down to the sixteen hundred with you?

A. No.

Q. Was he on the same cage that you went down on?

A. I couldn't tell you whether he went down on the same cage.

Q. Those cages, how many men are accommodated in those cages, how many men can get on those cages that take you down the shaft?

A. Well, nine,—eighteen altogether.

Q. Eighteen men can get on at one load?

A. Yes, one load.

Q. Double deck, is it?

A. Yes, Nine men in each place.

Q. Nine men on the lower deck and nine men on the other?

A. Yes.

Q. Then they have to make several trips to take Mr. Brown's shift down, don't they?

THE COURT: Well, that would appear, if there were more than eighteen.

MR. FOX: Q. Did you go down before he went down?

MR. McFARLAND: He answered that.

A. I didn't sure whether he going down before or come after.

Q. Where were you and he when he gave you the orders what to do that day?

A. He give me orders the first time he see me,

where I was working.

Q. He didn't give you any orders until after you had gotten into the stope?

A. No, not today, not before when he come in the stope where I was working.

Q. How did you know where to go to work that day?

A. He told me another day.

Q. He told you the day before?

A. It might be two days before.

Q. Had you been working in that particular place for more than two days ?

A. Yes.

Q. How long had you been working in that particular place where you were working when you were injured?

A. I think I was working about a week that time, and some time he take me in the other side of the shaft, one or two days' work on the east side of the shaft, and then come to the west side again, and the east side.

Q. In other words, you had been working in that same place off and on for a week?

A. I couldn't tell. It might be a week. I couldn't tell you that.

Q. The instructions the foreman gives you are simply where to go to, where and what to do, that is, whether you are to drill or to muck, or what, isn't that it?

A. Yes.

Q. When you went into that mine for the first

time the foreman told you, that is, the shift boss,—that was Mr. Brown, wasn't it?

A. Yes.

Q. Told you that you must look out to make your place safe, didn't he?

MR. McFARLAND: We object to that as repetition.

A. No.

MR. McFARLAND: He has answered that. He said no.

MR. FOX: No, he hasn't.

THE COURT: Well, he has answered now.

MR. FOX: Q. He didn't tell you anything about that?

A. When?

MR. McFARLAND: The same objection.

MR. FOX: Q. When you first went to work?

A. The first time I had the job and went to work?

THE COURT: I don't see that that is material, because the witness has stated that he recognized that as being one of his duties.

MR. FOX: Very well, Your Honor. I will withdraw the question.

Q. What would the shifter tell you to do at any time in reference to making the place where you were working safe?

MR. McFARLAND? We object to that as incompetent, irrelevant, and immaterial, and not proper cross examination, and not intelligible.

THE COURT: I think I will sustain the objection. You mean what did he tell him?

MR. FOX: What instructions have ever been given to him at any time by the shifter?

THE COURT: About making the place safe?

MR. FOX: Yes.

THE COURT: I just ruled on that a moment ago, didn't I, Mr. Fox? It would appear to me to be immaterial, inasmuch as this witness stated that he recognized it as his duty as a miner, when he first went in to work, to see that the place was safe for him and the muckers. He says he was doing that upon this day when the shift boss came along and told him not to give any more attention to that, and so forth.

MR. FOX: Very well, Your Honor. Before this witness leaves the stand, I now offer in evidence Defendant's Exhibit No. 1, for identification, and pass it to counsel.

MR. McFARLAND: We object to the introduction or admission in evidence of this exhibit, as immaterial, irrelevant, and incompetent, and not proper cross examination, and, if material at all, it is a part of the defendant's case; and for the further reason that this witness has shown that he couldn't read English, as testified, and that besides that, that the witness has testified that he went under the orders and instructions on this particular occasion of the shifter or shift boss.

MR. FOX: It might be that it is not proper to introduce it on cross examination under the decisions of our Supreme Court. I don't know how Your Honor rules, whether or not these exhibits may be offered and received on cross examination.

THE COURT: Oh, no; if it is material at all, or competent, it may go in at this time.

MR. FOX: I think it is the second or third rule there, Your Honor, that is material in this case.

THE COURT: You just offer it for those two rules perhaps, two and three?

MR. FOX: Two and three are the rules which I desire to offer, Your Honor.

THE COURT: I don't think they add very much to the testimony that has already been given, that is, in view of the fact that he recognized this to be his duty, but the objection will be overruled so far as those two rules are concerned.

MR. FOX: With the permission of the court I will read these to the jury:

"Federal Mining & Smelting Co. Notice to Employees. All employees must read these rules carefully before going to work:

"2. It is the duty of all employees to take sufficient time to make the examinations required by these rules, to guard against any dangers from accidents in the mine or its workings.

"3. Each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and, if necessary, the foreman or shift boss must be notified."

That is all.

RE-DIRECT EXAMINATION by

MR. McFARLAND:

Q. Louis, can you read English?

A. No, sir.

Q. Was that ever read to you by anybody?

A. No.

Q. When you wrote this, "I understand these rules," what did you write it from, if anything?

A. I didn't know what that mean.

Q. Did anybody give you anything? How did you write that? Did you copy it from a paper?

A. Yes, I copy it from the table.

Q. Somebody gave you a slip with that on it?

A. Yes, and he told me to write that way.

Q. Did you understand what that meant, when you copied it?

A. Which one?

Q. This thing here,—"I understand these rules"?

A. Yes, he told me to read it and I understand.

Q. He told you to write it?

A. Yes, he told me to write it.

Q. What kind of a paper was that on when you copied it?

A. Just a little piece of a card, something like a card, and somebody write that on the table.

Q. And told you to copy it here?

A. Yes.

Q. Told you to put that same thing down here?

A. Yes, sir.

Q. At the time that you copied it and put it here did you understand what it meant?

A. No, sir.

Mr. McFARLAND: That is all.

MR. FOX: That is all.

MR. McFARLAND: I will call Thomas Simih.

THOMAS SIMIH, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. McFARLAND:

Q. How old are you?

A. Thirty-nine.

Q. Where do you live?

A. I live at Mullan.

Q. What is your business?

A. My business is mining.

Q. How long have you been working in a mine?

A. I have been working a long time.

Q. How many years?

A. Oh, a long time, about twenty years.

Q. What mines have you worked in, in the Coeur d'Alenes?

A. I was working up in the Tiger and Frisco mine, the Hunter mine and the Morning mine.

Q. How long have you been working in the mines there in the Coeur d'Alenes, the big mines?

A. Oh, I have been working a long time there.

Q. Oh, about how many years?

A. Oh, I have been working in the Hunter mine about twenty-five months. I work in the Morning mine now about eight months.

Q. Do you know Louis Anderson, the plaintiff in this case, this man here?

A. Yes.

Q. Were you working there at the time he got hurt, in the Morning mine?

A. Well, yes.

Q. Did you see him after he got hurt?

A. Yes. I have been working far away, about a hundred feet from him.

Q. About a hundred feet from him?

A. Yes.

Q. What did you first notice?

A. Well, some fellows said, some muckers—

Q. Your attention was called to the fact that some rock had fallen?

A. Someone said someone is buried in the ground some place, and that is the reason I went to see.

Q. You went down there, did you?

A. I went to see who it was.

Q. And what did you find?

A. Well, I find that it was just a kind of a slide was come down.

Q. Did it fall on Louis Anderson?

A. Well, it was something kind of through the head and the slab.

Q. He was on the ground and the slab was on top of him, is that what you meant?

A. That is all.

Q. Was that a big or a little slab?

A. It was a pretty good size rock all right.

Q. About how much did it weigh?

A. Well, it might weigh six or eight tons all right.

Q. Did you help to get Anderson from under that slab?

A. Well, there was some kind of slab there between one rock laying down, between was some kind of a hole, and Louis Anderson was between two rocks, you know, it had his shoulder, you know, his head, was between two rocks, was fifteen inches between, Louis was between two rocks down; the rock kind of come on top, two rocks, maybe catch some other piece of rock, and he was tied, was all.

Q. Did you help to get him out of there?

A. Yes, I was trying to raise up that rock, is all.

Q. Did you see any bar, or crow bar, around where that rock was?

A. I see some drill, machinery.

Q. Did you see a bar?

A. Well, by God, I don't remember,—I never look for that.

Q. Did you see one?

A. Well, I see one in the place I have been working.

Q. I mean right there?

A. No; I seen the drill; maybe it was, by there, but I never seen it.

Q. What did you do with Louis when you took him out from under that rock?

A. He was down that little—Louis was down on the floor, a kind of a weakness, you know, and after that I was down, taking the ladder down, and took him up to the station.

Q. How many men carried him?

A. Two men.

Q. Was he conscious when he first got out from under the rock, was he conscious?

A. He was a little kind of out, you know.

Q. Asleep?

A. No; he was kind of tired, you know, out.

Q. Dizzy?

A. Yes; he knew a little bit.

Q. Did they put him on the muck pile for a while?

A. Just for a few minutes set down, was all.

Q. And then they carried him out of the mine?

A. He was through down the ladders with me.

Q. Are you a countryman of Louis?

A. No.

Q. You are a Serbian, are you?

A. Yes, sir.

MR. McFARLAND: That is all.

CROSS EXAMINATION by

MR. FOX:

Q. You went over there because you heard that somebody had been hurt over there?

A. Yes, sir.

Q. Did you go over there to look for steel?

A. No.

Q. While you were there trying to get this boulder off of him were you looking around to see whether you could find any bars or not?

A. Well, by Jesus, I never look, that is all.

MR. McFARLAND: You must not swear in court, Tom.

A. It is all the same anyway, that is all.

MR. FOX: Q. You say there was a bar over there where you were working?

A. Yes.

Q. What kind of a bar?

A. A bar about six foot long, something, six or seven, might be some seven, too.

Q. There were lots of them around there?

A. Sometimes there was lots all right.

Q. Well, on that day, you had plenty of them, did you?

A. I got one the place where I had been working.

Q. Were there any others in that stope, that you saw?

MR. McFARLAND: We object to that as not proper cross examination, Your Honor. We didn't direct our questions to bars where he was working, and it is not proper cross examination.

MR. FOX: Counsel brought it out.

MR. McFARLAND: No, not that.

MR. FOX: The inference that counsel seems to draw by the testimony of this witness is that there were no bars at the place where the plaintiff was working. It is manifestly proper to show that in the vicinity of where he was working there were other bars, in view of the fact that the plaintiff himself testified that he couldn't find them.

MR. McFARLAND: That is not proper cross examination.

THE COURT: The objection is sustained.

MR. FOX: Q. You say that there were two pieces of rock, one on each side of him?

A. Yes, maybe one feet high up, the big slab.

Q. Louis was between two rocks?

A. Might be a foot and a half high up.

Q. And they were laying up against his shoulder?

A. Yes, sir.

There was nothing on his back at all?

A. Well, by God, his head was in the hole, each side, between two rocks, you know. The slab was kind of—he never been here today; he would have been down in the grave yard, you know.

Q. Where was the machine?

A. The machine was under the slab.

Q. Under the slab too?

A. Yes.

MR. FOX: That is all.

MR. McFARLAND: That is all.

DR. C. E. WORTHINGTON, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. McFARLAND:

Q. You may state your name in full.

A. C. E. Worthington.

Q. Where do you reside?

A. Coeur d'Alene.

Q. How long have you lived in Idaho, Doctor?

A. Since 1888.

Q. What is your profession or business?

A. Physician and surgeon.

Q. How long have you been practicing your profession?

A. Since 1876.

Q. Are you a graduate of any regularly chartered medical school?

A. Yes.

Q. Surgical school?

A. Yes.

Q. What?

A. Of the College of Physicians and Surgeons.

Q. Are you licensed to practice medicine and surgery in the State of Idaho?

A. I am.

Q. Have you ever done any hospital work?

A. Yes.

Q. In what hospital?

A. Well, I worked in the hospital at Silver City, Idaho, and I worked in the hospital at Mullan, and I have my own hospital here, and I have worked in other hospitals.

Q. Have you ever been physician and surgeon for any corporation in the State of Idaho?

A. Yes.

Q. What corporation?

A. I was physician and surgeon for the Northern Pacific Railroad.

MR. FOX: I don't know that that enters into the qualification of a physician, if Your Honor please.

THE COURT: No. That is going into details.

MR. McFARLAND: Very well.

Q. I will ask you if you know the plaintiff, Louis Anderson?

A. Yes, sir, I know him.

Q. I will ask you whether or not you had occasion to make a physical examination of his person.

A. I did.

Q. When and where was that done?

A. It was the first of this week, probably Monday, or Tuesday.

Q. Where did you make this examination?

A. At my office in the hospital.

Q. What did you discover upon that examination in the way of injuries, if any?

A. I discovered that there was a trouble with his ankle.

Q. Just describe that to the jury.

A. Well, there is extreme tenderness of the ankle when you manipulate the foot, and there is a small amount of swelling right about there (indicating), and there was considerable tenderness of the heel.

Q. What would that indicate with reference to the character of his ailment or injury?

A. Well, it might indicate that some of those small tendons connecting the bones of the foot there had been—

MR. FOX: Just a moment. It seems to me that is pure speculation.

MR. McFARLAND: Q. What does it indicate?

A. Well, that is what it indicates.

Q. Go ahead. You didn't finish your answer, Doctor.

A. Well, it indicated that those small ligaments there may have been ruptured.

Q. Did you examine his arm and shoulder?

A. I did.

Q. And what did you discover, if anything?

A. Well, there is a good deal of soreness about the shoulder. There is an impeded movement of the arm, and down his right arm there is more or less anesthesia or loss of sensation, and also down his forearm, about his fingers, the first three fingers, the thumb and first two fingers.

THE COURT: Which arm?

A. It is the right arm, I believe, Your Honor.

MR. McFARLAND: Q. Did you manipulate his arms?

A. I did.

Q. In what manner did you do that, so as to make your test?

A. I manipulated it, all the movements the arm has, forwards and backwards and up and down.

Q. Did you make any examination of his back?

A. Yes, I examined his back.

Q. What did you ascertain from that?

A. I think there is a good deal of tenderness about the muscles of the back.

Q. On which side?

A. I think it is on the right side.

Q. Did you examine his head or his ear?

A. I did.

Q. What did you discover there?

A. Well, I am not sure about right at the point where I am laying the hand on the head whether there is a little depression of the bone there or not. There are little irregularities about the bone some-

times, but it occurred to me from the examination that there is a slight depression there; and then this tenderness on the left side of his face here that he complains of, and the sore in his ear.

Q. Did you have any means of testing whether there was actually a tenderness in the region of his temple?

A. No, I had no means of doing that excepting just to prick him with a pin or a knife that I used.

Q. Well, did he respond to this pricking?

A. Yes, he did, to that.

Q. Did you use your knife or a pin in testing his arm and shoulders?

A. I did.

Q. To see whether there was lack of feeling there?

A. Yes, sir.

Q. What was the result?

A. On a part of his arm there seemed to be a lack of feeling. He wouldn't pay any attention to it. I had him close his eyes, and I pricked him, pricked his arm with the knife, and told him to say yes if it hurt him, and up and down his arm from his elbow, and then down along here he didn't respond.

Q. How about his ear, Doctor?

A. Well, there is nothing about his ear except a sore in his ear there, and I thought at the time that I examined him that there was possibly a little hard wax accumulated, and I removed that, and the ear bled pretty freely, and instead of wax there was a little scab.

Q. Assuming that he received those injuries on the eighth day of May last, what have you to say with reference to whether or not in your opinion those injuries are permanent?

A. Well, I believe that they are, for this reason: It occurs to me that if those injuries were not permanent a man after this length of time should be well.

MR. McFARLAND: You may inquire.

CROSS EXAMINATION by

MR. FOX:

Q. Doctor, turning now to the foot or ankle.

A. Yes, sir.

Q. The only symptom from which you made a determination that something was wrong with that ankle was the fact that he complained of pain when you moved the ankle, is that correct?

A. Yes.

Q. The only symptom that you had that there was anything the matter with his shoulder was the fact that he complained of pain and loss of sensation?

A. And loss of motion.

Q. He complained of loss of motion and pain and loss of sensation?

A. Yes, sir.

Q. As a matter of fact, referring now to the depression which you state is upon the head, you are not willing to testify that that is the result of an injury, are you, Doctor?

A. I am not willing to testify that that is an ab-

normal condition in his case, but it looks to me like it is; but I wouldn't say positively.

Q. You think it is simply an abnormal condition of the cranium in his case?

A. It has the appearance of being a slight depression there, but we find those depressions sometimes on normal persons.

Q. Persons perfectly normal?

A. Yes.

Q. If the depression had been made there by a fall of rock from a stope upon a man's head sufficient to send him to the ground you would expect that he would have to have an operation?

A. Not necessarily.

Q. But it would severely incapacitate him, so much so that he wouldn't recover to the extent that he is recovered at the present time?

A. That is a question, you know. Some of them it might do that with, and others it might not.

Q. Then if he has recovered to the extent that he has recovered at the present time you wouldn't lay any stress upon that depression being serious, even though it were made by rock falling on the head?

A. If that depression was made by rock falling on the head I would consider it serious.

Q. And there should be other symptoms, probably paralysis?

A. Not necessarily paralysis, but you might have the external table of the skull depressed, and at the same time it would either rupture or compress those

veins inside of the bones of the skull, in what we term the—between the two tables of the skull.

Q. I understand you to say that if a falling rock had made that depression it would be a serious injury?

A. I didn't say that. You misunderstood me.

Q. You wouldn't consider it a serious injury?

A. I don't think you understood me to say that either.

Q. I would like to find out what you said.

A. I said if it was from an injury it would be a serious matter, if the depression there interfered with the circulation.

Q. It would be so serious that you would expect to find some symptoms throughout the body that would indicate that there was pressure at that point?

A. No. The external table of the skull may be depressed without depressing the internal table at all, and in that case the veins that are between the two tables of the skull might be shut off or injured.

Q. In what way then would you consider that that was serious?

A. And you might have numbness of the parts, of the face there; you might have headache, you might have trouble with the eyes; and you might have trouble with the hearing.

Q. Yes. What else?

A. That is all.

Q. That is all, is it?

A. As to that, yes.

Q. Now, he hasn't any numbness of those parts, has he?

A. I think he has, right alongside of the face here.

Q. And you think that might be the result—

A. That might be the result of that.

Q. He didn't complain to you of any headache?

A. All the time; I said he was complaining of the headache more or less all the time.

Q. And of course the only way you have of telling that he has a headache is by taking his word for it?

A. You have got to.

Q. And of course the only way you have of telling whether it is paining him here on the side of the face is by taking his word for it?

A. About the pain, yes.

Q. But that is all you found?

A. I found that and the numbness there. He didn't respond when you pricked the side of his face.

Q. You have to take his word for that too?

A. If he shuts his eyes you can tell whether he flinches or not.

Q. Now, Doctor, it is his left arm which you say showed the numbness, or was it his right arm?

A. His right arm.

Q. And the numbness was manifested in what fingers?

A. In the thumb and the first and second fingers of the right hand, and a part of the third finger, I think it was.

Q. Which part of the third finger?

A. Next to the center.

Q. What nerves feed those fingers?

A. The radial and ulnar nerves.

Q. And what portion of those fingers do the radial and ulnar nerves serve, that is penetrate?

A. They penetrate along through the front part and along each side.

Q. How about the inside of the hand, doctor?

A. Well, not so much so, I don't think, on the inside.

Q. What nerve is it that runs into the hand?

A. The radial nerve affects those fingers more particularly, or branches from the radial nerve.

Q. On the inside of the hand which nerve is it?

A. It would be the branches of the same nerve there.

Q. Branches of the radial nerve?

A. Yes.

Q. Would you give us the name of the nerve?

A. I can't give you the names of them.

Q. You can't give us the names?

A. No, I can't give you the names of them, because I have only designated them as branches of the radial nerve.

Q. And you say the ulnar nerve also runs into the thumb?

A. On that side of the hand.

Q. Runs into the thumb?

A. I didn't say that. You asked me the question, what nerve supplies the hand, and I said the ulnar nerve.

Q. No, I asked you what nerve supplied those fingers which you say—

A. I told you the radial nerve.

Q. What does the ulnar nerve do, then?

A. It supplies those smaller fingers on that side.

Q. Doctor, did you make any X-ray plates?

A. No, not of this case.

Q. You haven't made any X-ray plates?

A. No, I haven't made any X-ray plates at all.

MR. FOX: I think that is all, doctor.

RE-DIRECT EXAMINATION by

MR. McFARLAND:

Q. Now, in manipulating his arms, in what way do you do that?

A. I put the arm up over the head this way (illustrating), and this way (illustrating), and throwed it back, and every movement that could be made with the arm, we done that.

Q. Did you do that with both of his arms?

A. Yes, sir.

Q. What was the difference, if anything, in the movement or action of his arms?

A. In his right arm he could throw his head this way, and throw the arm clear up, so that it would be against his head,—his left arm, I mean, and on his right arm, if I throwed it up there would be a space there.

Q. What did that indicate?

A. It indicated an impaired movement of the shoulder.

Q. Did I understand you to say you found his ankle swollen too?

A. There is a little puffiness in the ankle there at the point I indicate with my finger.

MR. McFARLAND: That is all.

MR. FOX: Where is that, again?

A. (Indicating).

MR. FOX: Right about there?

A. (Indicating).

MR. FOX: That is all, doctor.

MR. McFARLAND: The plaintiff rests.

MR. FOX: I desire to make a motion, if Your Honor please.

THE COURT: Gentlemen of the Jury, you may retire for a few moments. Just go to the grand jury room.

(The jury thereupon retired from the court room.)

MR. FOX: The defendant, Federal Mining & Smelting Company, now moves this court to grant a non-suit, and to dismiss the action, upon the following grounds, to-wit:

1. That the plaintiff has wholly failed to prove that any injury which he sustained and complained of in his complaint was the result of any negligence on the part of defendant, or that the negligence of the defendant was the proximate cause of said accident and injuries.

2. If the plaintiff in this case sustained the injuries complained of, he sustained them by reason of his own negligence and carelessness, and his own contributory negligence and carelessness.

3. If the plaintiff was injured, as alleged, he was injured by reason and through the risk of his employment, the falling of rocks under the conditions stated, which was an obvious risk of his employment.

4. If the plaintiff was injured as alleged, he was injured by reason of the negligent act of a fellow servant.

(Argument and citation and reading of authorities by counsel.)

THE COURT: There seems to be just about one question here, gentlemen, and that is as to whether or not,—as to the particular emergency here, or condition,—the shift boss acted for the master, the defendant company. While these rules (referring to Defendant's Exhibit No. 1) are not very clear upon that point, I am rather inclined to take the view that such was the intention of the company in promulgating them. They provide that it is the duty of all employes to take sufficient time to make the examination required by these rules to guard against any dangers from the working of the mine. "Each man must ascertain by careful examination thereof that the particular place in which he is employed is safe." Now it is true that the plaintiff in this case, taking his testimony for it, while he did not read these rules, and hence did not know what they contained, still he recognized that such was the custom and practice of miners in that community, and he was proceeding upon the theory that such was his duty; that is, it was his duty to make a careful examination of the particular place where he was going to work, to see that it was safe. Now, if found to be in an unsafe condition, the rule proceeds to say: "from any cause whatever, measures must be taken to remove such dangers at once and before proceed-

ing to work, and if necessary the foreman or shift boss must be notified." There would seem to be a recognition of the authority of the shift boss in matters of this kind. Otherwise there would seem to be no reason for notifying him. Suppose that this plaintiff had found, a latent danger here, a crack in the back of the stope where he was working, or suppose, having a piece of steel which he said was necessary, he had discovered that the sound indicated that a slab of this overhanging rock or roof was loose, and, not being able to satisfy himself that it would be safe to go on with the work, he had notified Mr. Brown, the shift boss, of such a condition, and thereupon Mr. Brown examined it and said, "That is all right, Louis,"—or whatever he called him,—“you go ahead and work; it is safe.” It seems to me that it would be a very harsh view to take, for us to say that this miner would not have been justified in proceeding under those circumstances, or that the master would not have been responsible if the shift boss had acted negligently in giving those directions. The master doesn't say to the miner here, "If you find an unsafe condition, notify the superintendent or the general manager, or the president of the company." But it says to him, "Notify the shift boss," apparently making him a vice-principal for the purpose of determining whether or not the conditions are safe. Otherwise, if the shift boss were notified and he made some change in the situation it would still be necessary for the workman to determine whether or not it was safe, and he might come into

an open and immediate dispute with the shift boss, and what would be the result?

MR. FOX: If Your Honor please, I desire to add the further ground, if I might—

THE COURT: Yes.

MR. FOX: —to the motion. And that is, that it is not alleged in the complaint that the plaintiff was injured by reason of any direction, any negligence or otherwise, or following any direction, negligent or otherwise, of the defendant company, or of any shift boss. The only negligence alleged is the failure to furnish a reasonably safe place, the failure to furnish him with tools with which to do the work, and it is not a ground of negligence alleged in the complaint.

MR. McFARLAND: The complaint is very specific in stating that the defendant permitted the place where he was working to become dangerous and unsafe. But of course I do not have to state all of the probative facts. Now, for instance, here in the complaint—

THE COURT: One at a time.

MR. FOX: I had in substance finished. That was perfectly all right. Go ahead, counsel. I would like to have you, however, point out to the court the particular paragraph where you allege that the accident happened by reason of a direction of the shift boss.

THE COURT: That wouldn't be necessary, Mr. Fox, in the view I take; in other words, if I am correct in taking the view that the matter here consti-

tuted the shift boss a vice-principal for the purpose of seeing that the mine was kept in a reasonably safe condition, then this proof would be admissible under the general allegation that the principal, that is, the defendant, acting through the shift boss as its representative for that purpose, had failed to keep the mine safe.

MR. FOX: Of course, I think the view which Your Honor has taken is a little bit limited on the shift boss, on the duties of the shift boss there. Now, occasions do arise, as is well known, in mining, when a condition of affairs may exist which it is not possible for any one man to remedy, and it takes possibly the assistance of the timber men and the blasters, and so on, and under severe conditions it is necessary to inform the shift boss. But where a man is mining underground, and all he has to do is to perform the ordinary duties which are imposed upon him as a miner there, I say that the shifter, under the rule, under the customs existing there, the written rules and the customs as they exist, has no right to interfere, and if he does interfere, he interferes not as the master, but as a fellow servant. That is the distinction.

THE COURT: I may be wrong, Mr. Fox, in the construction that I have placed upon this rule, but it is a rather harsh doctrine anyway for which you contend, to say that a man who is under the control and direction of a shift boss is to take the consequences of obedience to his orders, and I am not inclined to give the doctrine place further than is reas-

onably necessary, when in the light of a rule of this kind it appears to have been the intention of the master to constitute the shift boss a vice-principal, that is, to invest him with the authority to listen to the complaints or warnings of workmen relative to this particular subject, as to the safety of the place where the miner happens to be working. Now, as I have already stated, if this man had discovered a crack in the back there, or had discovered the possibility of danger, from the sound, by using his steel, and had gone to Mr. Brown and had said to him, "I am afraid that isn't safe; what shall I do"—now suppose Mr. Brown had gone there and examined it, and said, "I think it is all right, Louis; go ahead; I am confident there is no danger here"—for a court to say that under those circumstances the plaintiff assumes the risk of following the directions of his superior, one who is apparently delegated with the authority, and exercises the discretion of, the master, in determining whether the place is safe, seems to me to be a very harsh doctrine. If the defendant had said to this man, "If you are not satisfied with the conditions, report to the superintendent, or report to some other person" and instead of doing that he had taken the word of the shift boss, or a fellow employe of the mine, then I would say that he had acted recklessly; at least he would have been bound by the rules to which he assented when he went to work. The motion will be denied. Let the jury be brought in.

MR. FOX: Your Honor will allow us an exception?

THE COURT: Yes.

(The jury thereupon returned into court.)

MR. FOX: If Your Honor please, and Gentlemen of the Jury, the defendant will prove to you the following state of facts without any question of a doubt. According to the usual custom of miners as they went down under-ground, the plaintiff in this case went to the place assigned to him, as he has already told you, and where he had worked from time to time, and he set about his labors and usual duties as a miner. Contrary to what he has testified, we will show you by witnesses who saw this ground that there was a large crack extending lengthwise, if I understand correctly, of the stope, and that there was a large overhanging boulder in about this position, as I indicate. The ground under which the plaintiff was working was lower than the opposite side. He had a buzzer machine, and was drilling in under it slightly at an angle. The crack plainly disclosed that there was a large slab there. He was drilling when the foreman, Mr. Brown, came along, and Mr. Brown told him not to work under there, but to bar that ground down, and the plaintiff then said, "Why, it is all right." He said, "If that rock comes down it is on the other side and it can't hit me". That is the language of the conversation in substance and effect. We will also show you that the timber man came there and likewise observed that ground in that condition and the plaintiff negligently working under there, and he too called the plaintiff's attention to it, and said, "What are you working under that ground

for? That is liable to come down on you.” And again the plaintiff said, “It can’t hurt me if it does come.” We will show you that it isn’t true that the shifter came in there and told him that he must not bar down. That this is contrary to the rules and instructions given him. We will further show you that, contrary to his testimony, there were bars there, that the men who had just finished those holes there in that rock were just going out as the oncoming shift, on which the plaintiff was, was going in, and that this man who was drilling there left the steel, the bars, there. I will show you that, as proof conclusive, that the bar was there. It couldn’t have been disturbed or taken away between the time the last shift went out and the time the new shift came in.

When we have shown you these things, gentlemen of the jury, in connection with some testimony by a physician who made an examination here, we think we will be entitled to a verdict at your hands. I will call Mr. John Conlon.

JOHN CONLON, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. FOX:

Q. Mr. Conlon, will you please give your full name?

A. John Conlon.

Q. Where do you reside?

A. Mullan, Idaho.

Q. What is your business or occupation?

A. Mining.

Q. Are you working for the Federal Mining & Smelting Company?

A. I have been lately.

Q. And at the Morning mine?

A. Yes, sir.

Q. Are you still working there?

A. I am.

Q. In what capacity are you working?

A. Miner.

Q. How long have you been working as a miner in the Morning?

A. I have been working there off and on for a couple of years.

Q. Were you working there on the 8th of May, the day on which the accident occurred to the plaintiff in this case?

A. Yes, sir.

Q. Were you working on the day shift?

A. I was working on the day shift.

Q. Where were you working on the day shift?

A. On the eighth floor of the sixteen hundred.

Q. With reference to the place where the plaintiff was injured?

A. Yes.

Q. At the same place?

A. The same place.

Q. Are you the miner who drilled the holes in that piece of rock that came down, that was described by the plaintiff here?

A. Yes, I drilled them holes.

Q. Did you meet the oncoming shift as you were going out?

A. Met them at the lower station.

Q. That would be down the shaft on the sixteen hundred foot level?

A. Sixteen hundred foot level.

Q. How long was it between the time that you left the place where you had been working and the time you met these men going in?

A. I should judge about ten minutes since I left the stope.

Q. What was the condition of the place that you left it in at the time you came off shift that night?

MR. McFARLAND: We object to that as immaterial.

THE COURT: Overruled.

A. It was about the same as it was when I quit my drill. I barred it down the best I could before I started to drill.

Q. I mean to say with reference to the tools, what tools were there?

A. The machine was there, set up, a hammer machine, hammer drill, a pinch bar, and a pick, and some steel, there.

Q. What is a pinch bar?

A. What we use to bar down the roof.

Q. How large an instrument is that?

A. Oh, about inch and a quarter steel.

Q. How long?

A. It runs from four to eight feet, or nine feet.

Q. Just tell the jury whether or not you had made use of that pinch bar?

A. Yes.

Q. On that day?

MR. McFARLAND: We object to that as immaterial, whether he had made use of it.

THE COURT: Overruled.

A. I barred it down in the morning before I started to drill.

Q. What was the condition of the ground at the time you left it?

A. Apparently it was safe, but there was a big slab there with a crack in it that I couldn't get down with the bars. I got other fellows to help me, and we got two pinch bars, but we couldn't get it down, and I thought it might hold till we could get through, and I didn't get through drilling until the other shift came on.

Q. Did anything occur with reference to blasting just as you were going off shift?

A. They blasted close by there.

Q. I will ask you to tell the jury whether or not any powder smoke came through the stope from that blasting?

MR. McFARLAND: We object to that as immaterial.

THE COURT: Overruled.

A. Certainly the powder smoke come through there when they blasted.

Q. When you left was there powder smoke in the stope?

A. Yes.

Q. How large a rock was this, how large a piece was this slab that was sticking up there?

A. About four foot thick, I should judge, and about eight foot long.

Q. Which way do you mean long,—lengthwise?

A. From the foot to the hanging, across the stope, from wall to wall. She wasn't broke as far as the hanging wall goes; she was fast. I thought that would be sufficient to hold her.

Q. How big a crack was there in that?

A. You could put your hand in the crack.

Q. How long was the crack?

A. She run about five feet.

Q. And that was the piece of rock in which your drill was sticking, with the machine up, was it?

A. Yes, the same one.

Q. Now, what is the duty of a miner, under the rules and customs in that mine, when he goes into a stope like the one you had been working in, say the next shift, and sees the condition of the ground there, what is the duty of a miner that is about to do work in that place? What has he got to do?

MR. McFARLAND: We object to that, if the court please, for the reason that there appear to be printed rules here, and the rules are the best evidence of what they require.

MR. FOX: Rules and customs, if Your Honor please.

THE COURT: Do you desire to show that the rule is different from that stated by the plaintiff?

MR. FOX: No,—his duty to bar down and make the place safe, is the purpose of the evidence.

THE COURT: He has stated that. Will it be necessary to take up time in going into it further?

MR. FOX: Well, if it is admitted that that is his duty.

THE COURT: The plaintiff recognized that as being the rule.

MR. FOX: That is all. You may inquire.

CROSS EXAMINATION by

MR. McFARLAND:

Q. Mr. Conlon, had you been operating that drill, the one that the plaintiff used that evening?

A. Yes, I used it that day.

Q. And it stood where you left it that night, where you got through with the work?

A. It certainly should.

Q. Did you drill those two holes there that were already drilled?

A. I did.

Q. And you drilled that one that was partially drilled?

A. Yes, sir.

Q. Isn't it customary and usual for shots to be put into these holes before the next shift comes on?

A. No, sir, not in that mine. They blast when the night shift is going out; the eleven o'clock shift does the blasting.

Q. You mean to say that the day shift drills holes and leaves them until the night shift goes off, and then the blasters come on and they blast them?

A. That is exactly what they did.

Q. You say you noticed a crevice in this slab overhead in that place?

A. I did.

Q. Why didn't you folks call for the blasters to blast this out?

A. I didn't think it was necessary.

Q. Why?

A. Because I thought she would hold up.

Q. What made you think she would hold up?

A. I do a lot of thinking and guessing in the mine.

Q. You say there was a boulder overhead there?

A. I did not.

Q. What did you say about a boulder?

A. I didn't say anything about a boulder.

Q. Was that slab just over your machine, was it right over your head?

A. I was drilling under it.

THE COURT: Was it right over your head?

A. Certainly.

MR. McFARLAND: Q. Did you drill there after noticing that crevice in there?

A. I did.

Q. You knew when you were drilling there—

A. I wasn't going to let it come down on me, because I had a stull there to put under it if it slackened any.

Q. But if it had fallen suddenly it would have fallen on you?

A. Yes.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by

MR. FOX:

Q. How far was this blasting that occurred when you were going off?

A. About eight sets.

Q. On the same floor?

A. Yes, sir.

Q. I will ask you whether or not blasting has a tendency to loosen rock in the vicinity?

A. Certainly.

MR. FOX: That is all.

RE-CROSS EXAMINATION by

MR. McFARLAND:

Q. What do you mean by eight sets?

A. Five foot to the set.

Q. That would be then about forty feet away that the blasting was going on?

A. About that. I didn't count them.

Q. It wasn't a hundred feet away?

A. No, I don't think so.

Q. You didn't see the blasting yourself?

A. No, I didn't stay there.

Q. And you didn't see that slab after you left there that evening?

A. I saw it the next morning, after it was down.

Q. You don't know whether that blast had any effect on that slab, do you?

A. No, I didn't stay there.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by

MR. FOX:

Q. Counsel asked you why you didn't get the blasters to blast down that rock. Just tell the jury what the fact is as to whether or not any blasters are in the mine until after twelve o'clock at night.

A. The blasters don't come on until eleven or half past eleven.

Q. And if there is any blasting to do in the day-time, who does that?

A. The miners do it themselves.

Q. You mean the machine men by miners, do you?

A. Yes, sir.

MR. FOX: That is all.

RE-CROSS EXAMINATION by

MR. McFARLAND:

Q. Did you call the attention of the shift boss to that slab?

A. I did.

Q. When did you do that?

A. As soon as I noticed it.

Q. How long had you been working there before you noticed that crevice?

A. As soon as I went in and looked at it, I noticed it.

Q. That was that morning?

A. Yes.

Q. And you worked there all that day while that crevice was there?

A. I didn't work there all day. I didn't start to drill there until after one o'clock.

Q. You drilled those two holes and the other one partially?

A. Yes, sir.

Q. Did the shifter come in there and examine it?

A. He didn't examine it at all. He told me to look after it, and if it wasn't safe to put a stull under it.

Q. He didn't come in and look at it?

A. He come and looked at it, yes.

Q. Did he tell you to go ahead and work there?

A. He didn't tell me anything of the kind; he told me to catch it up if I thought it wasn't safe.

Q. What did he say to you about whether you should continue to work with that crevice there?

A. He told me I was taking a chance, and if it wasn't safe I had better put a stull under it.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by

MR. FOX:

Q. How long did you bar down?

A. From eight o'clock until about half past one.

Q. And you are eight hours on shift?

A. Yes.

Q. Isn't it a fact that sometimes the miners bar down all day, without drilling any?

A. Yes.

MR. FOX: That is all.

MR. McFARLAND: That is all.

MR. FOX: Andy Berg.

ANDY BERG, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. FOX:

Q. State your full name, Mr. Berg.

A. Andy Berg.

Q. Where do you live?

A. In Mullan.

Q. Where are you working?

A. In the Morning mine.

Q. You are working in the Morning mine?

A. In the Morning mine.

Q. What are you doing in the Morning mine?

A. I am timbering.

Q. How long have you been timbering at the Morning?

A. Two years.

Q. Were you timbering there on the 8th day of May, 1915, last year, that is, the day on which the accident to the plaintiff occurred?

A. Yes.

Q. And where were you timbering?

A. I was timbering on the ninth floor.

Q. Did you at any time go by the place where he was working before he was hurt, before the slab came down?

A. Yes.

Q. How soon after you went on shift did you go by there?

A. Well, it was a long time ago; I don't remember how long.

Q. Could you give us any idea at all?

MR. McFARLAND: We object to that, if the

court please. He says it is a long time, and he doesn't remember. It would be just a guess.

MR. FOX: Q. Approximately how long?

MR. McFARLAND: The same objection.

THE COURT: Overruled.

A. Well, I think about half past five, or something.

Q. Half past five?

A. Yes.

Q. When did you go on shift?

A. Half past three.

Q. What did you go by there for?

MR. McFARLAND: We object to that as immaterial, if Your Honor please.

THE COURT: Overruled.

A. I went over there to get some nails.

Q. Were you working on the eighth floor?

A. On the ninth.

Q. On the ninth?

A. Yes.

Q. That is, you were working further over?

A. Yes, sir.

Q. Further west?

A. Yes.

Q. The ninth floor hadn't been cut through at the place where the plaintiff was working?

A. No.

Q. He was working on what would be the ninth floor when he got the stuff out?

A. Yes.

Q. When you went by there what was he doing?

A. He was drilling.

Q. Which way was he drilling, what ground was he drilling?

A. He was drilling into the back.

Q. How high was the back at that place?

A. Oh, about five feet from the muck pile.

Q. Did you notice any slab or boulder hanging on the wall in which he was drilling?

A. Yes, I noticed a big crack there.

Q. You say you could see a big crack there?

A. Yes.

Q. How long was that crack?

A. Oh, about five or six feet.

Q. How wide was it?

A. About an inch and a half, or something like that.

Q. You could stick your hand in it?

A. Yes.

Q. How high up from the top of the muck pile was this crack?

A. It is hard to tell.

Q. Could you reach it?

A. That crack?

Q. Yes.

A. Yes, you could reach it.

Q. That is, by standing on the muck pile you could reach it, could you, with a bar?

A. Oh yes.

Q. Did you have any conversation with the plaintiff at that time?

A. Yes, I was talking to him, to Louis Anderson. I said, "You are standing in a dangerous place there; you had better get away from it."

Q. What did he say?

A. Oh, "I tried to bar it down", he said, "and I couldn't get it down."

Q. Did he say anything else?

A. He says, "I am too far away from there, I stay behind."

Q. He said, "I will stay behind; I am too far away from it"?

A. Yes.

Q. I will ask you, did he say anything to you to the effect that if it came down that it couldn't catch him?

MR. McFARLAND: We object to that as leading and suggestive, if Your Honor please.

THE COURT: Sustained.

Q. What did you do then?

A. Went to where I was working.

Q. Did you go back to the place where he was after the slab had fallen?

A. Yes.

Q. Just tell the jury whether or not it was the slab about which you have been talking that came down and struck him?

A. Yes, it was the slab that was over the muck pile there that fall down on him.

Q. Is that the slab that you had been talking to him about?

A. Yes, that is the slab.

Q. How soon after you talked to him about this slab did it fall?

A. About five or ten minutes.

Q. Where was the machine after the rock had fallen?

A. Under the slab, I suppose. I didn't see the machine.

Q. Was that still standing up?

A. No.

MR. FOX: You may inquire.

CROSS EXAMINATION by

MR. McFARLAND:

Q. How long was this slab that you saw up there?

A. Well, it was about five or six feet.

Q. How wide was it?

A. The crack, you mean?

Q. No,—the slab.

A. Which way you mean,—across the top?

Q. Across the stope. You said it was five feet long. How wide was it?

THE COURT: Do you mean the crack was five feet long, or the slab?

A. The crack was five or six feet long.

MR. McFARLAND: Q. How long was the slab that fell down?

THE COURT: This witness may not understand what you mean by slab. It is possible that there wasn't any slab up there until the crack proceeded all the way around it.

MR. McFARLAND: Q. Do you know what a slab is, a slab of rock?

A. Yes, I know what it is.

Q. You saw that rock after it fell down, didn't you?

A. Yes.

Q. It was one big slab?

A. Yes.

Q. How long was that?

A. Oh, it was five or six feet.

Q. And how wide was it across?

A. Oh, I don't know how wide it was. I think it was about three or four feet.

Q. Do you know how thick it was?

A. It was around three feet thick, I think.

Q. You say you saw a crack in that slab?

A. Yes.

Q. Which way did that crack run?

A. Well, the crack was facing the east.

Q. Did the crack run across this slab, through the slab?

THE COURT: The crack in the slab, you say?

MR. McFARLAND: I am asking him that to see, Your Honor.

A. The crack was in the back, you see.

MR. McFARLAND: Q. What were you doing when you went there to where Louis Anderson was working?

A. I went over there to get some nails.

Q. Did he have any nails?

A. No, the nails was over the timber there.

Q. How far was that from where his machine was?

A. The nails was?

Q. Yes.

A. Oh, that was about twenty-five feet.

Q. Do you know how long Anderson had been running his machine before you went there?

A. No, I don't know.

Q. You don't know whether he had just started it up, do you?

A. No, I don't know when he started, but he was drilling when I passed through there.

Q. He was drilling when you passed there?

A. Yes, sir.

Q. Did he stop drilling to talk to you?

A. Yes.

Q. He stopped the drill, did he?

A. Yes.

Q. And then about ten minutes afterwards you heard this slab fall, didn't you?

A. No, I didn't hear it fall.

Q. You learned that it fell? About ten minutes after that, you found that the slab fell?

A. Yes. The shift boss was hollering to me, said a man was buried up in the muck.

Q. Was there anyone there when you were talking to Louis Anderson?

A. No.

Q. Was there anyone in sight?

A. No.

Q. Was this slab just right straight up above him and above the machine?

A. It was up above the machine.

Q. Right straight up above the machine?

A. Yes, sir.

Q. And he stood alongside of the machine, did he?

A. Yes.

Q. How wide did you say this crevice or crack was?

A. About an inch and a half.

Q. About an inch and a half?

A. Yes.

Q. Did he tell you that he had been trying to bar that down?

A. Yes.

Q. Did you see any bars around there at that time?

A. No, I didn't look for any bars.

Q. Did you see any there?

A. No, I didn't see any bars.

MR. McFARLAND: That is all.

MR. FOX: That is all.

JOHN C. BROWN, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. FOX:

Q. What is your name, Mr. Brown?

A. John C. Brown.

Q. Where do you reside?

A. Mullan, Idaho.

Q. What is your business or occupation?

A. Miner or shift boss.

Q. Are you now working for the Morning mine, at the Morning mine, for the Federal?

A. Yes, sir.

Q. How long have you worked there as a shift boss?

A. About three years and a half.

Q. Were you working there on the shift on the eighth day of May, on which the plaintiff was injured?

A. Yes, sir.

Q. What was you doing then,—shifting?

A. Shifting.

Q. What shift did you have,—the afternoon shift or the morning?

A. The afternoon.

Q. What time did you go underground with the shift?

A. We started in at half past three.

Q. How many men have you under you?

A. Oh, thirty-five or forty.

Q. You had the sixteen hundred level, did you?

A. Yes, sir.

Q. Any other level?

A. Eighteen.

Q. Eighteen and sixteen?

A. Yes.

Q. How far are those two levels apart?

A. Two hundred feet.

Q. And the stoping occurs between the two levels, for instance, from the eighteen hundred to the sixteen hundred there are a great number of stopes, floors. How many floors between the levels?

A. Twenty-two.

Q. And then from sixteen to the fourteen hundred is two hundred floors, or twenty-two floors, in which stoping goes on?

A. Yes, sir.

Q. And your men on the sixteen hundred were working on the seventh and eighth floors, is that correct?

A. At that particular place, seventh, eighth and ninth.

Q. At the place the plaintiff was injured the ninth floor hadn't been cut yet?

A. No.

Q. He was working on the eighth floor, on what is known as the second cut, is that correct?

A. Yes, sir.

Q. How high was the muck pile at that place, as near as you can remember?

A. Probably eight feet.

Q. How far was it from the top of the muck pile to the back or roof?

A. About five feet.

Q. Just how soon after you went on shift did you go to the place where the plaintiff was working?

A. About an hour and three-quarters.

Q. After he started to work?

A. Yes, sir.

Q. What were you doing in the meantime?

A. Going through the other level.

Q. How far are these men that are working for you apart?

A. Oh, that varies.

Q. Well, on this particular shift.

A. They are scattered all over both levels.

Q. And in order to get to them you go down the

shaft say from sixteen to the eighteen, if you want to get to the men on the eighteen you take the cage down, and go down in to the eighteen, and then walk up to the floors where the men are?

A. Yes, sir.

Q. In other words, you can't be there all the time to supervise all the work?

MR. McFARLAND: We object to that as leading and suggestive, if the court please.

MR. FOX: Q. Just state what the fact is Mr. Brown, as to whether or not it is possible for you to be at the different places where the men are at work under you to supervise and direct the work continuously?

MR. McFARLAND: We object to that, if Your Honor please, because it stands to reason that he can't be in more than one place at one time.

THE COURT: Let him answer. The answer wont hurt you any.

WITNESS: Read the question then.

THE COURT: Oh, you can't be in several places at the same time?

A. No.

MR. FOX: Q. How often do you make the rounds on your shift?

A. Two and three times a shift.

Q. Now, when you went to the place where the plaintiff was working, what, if anything, did you observe?

A. I observed bad ground over where he was working.

Q. Just describe that ground a little bit more in detail to the jury.

A. There was a crack in the back of the stope where he was working.

Q. How high above the place where he was working?

A. Probably six or seven feet.

Q. And how long was this crack?

A. Four or five feet long.

Q. Just in your own way describe the position of that crack with reference to the walls or the back, the contour of the crack.

A. One side of the stope was considerably higher than the other, that is, the foot wall side was blasted out higher than the hanging wall, and this slab run from the hanging wall up like that (indicating), and there was a crack coming in over it. It was very thin on this edge, but it run back and got thicker at the back end.

Q. And where was the plaintiff working with reference to this slab?

A. He was standing down under here, next to the wall.

THE COURT: Next to the foot wall, you mean?

A. Next to the hanging wall.

MR. FOX: Q. Which way was he drilling?

A. He had his machine pointed up into the back end of the slab.

Q. What, if anything, did you tell him, or what, if any, conversation did you have with him at that time?

A. I says, "What are you doing under there"? He says, "I am drilling". I says, "That is bad ground over you." He says, "Well, I tried to get it down but I couldn't." I says, "Well, that don't look good to work under."

Q. What did he say?

A. I told him that that didn't look good to work under, and he says, "I am away back next to the wall, out of the road, if it does come down." I says, "Well, it don't look good to me," and he says, "Well, if it falls it wont touch me anyway." So I passed on.

Q. How long had he been working for you?

A. I think he had worked about a year.

Q. And how long had he been working in that particular stope there?

A. He worked there three or four months.

Q. Now just tell the jury as to whether or not you considered him a good miner?

MR. McFARLAND: We object to that as immaterial.

THE COURT: Overruled.

A. I did.

MR. FOX: Q. Just tell the jury what the fact is as to whether or not the shifter must rely upon the judgment of the men who are working under ground as to whether or not it is safe.

MR. McFARLAND: If Your Honor please, we object to that as incompetent, irrelevant, and immaterial, and calling for the opinion and conclusion of the witness, and usurping the functions of the jury and the court.

MR. FOX: He is an expert miner, if Your Honor please.

THE COURT: I think I shall sustain the objection to the question in this form. It is possible that what you are seeking to elicit is material and pertinent, but the question, as you ask it at least, is objectionable.

MR. FOX: Q. When you went by there, Mr. Brown, and had this conversation with the plaintiff, and the plaintiff told you that in his judgment it was safe, or words to that effect, and you knew he was an experienced miner, just tell the jury what the fact is as to whether or not you relied upon his judgment in reference to the condition and character of the rock?

MR. McFARLAND: We object to that for the same reasons contained in our last objection, and for the further reason that this witness has testified that notwithstanding that the plaintiff said that he was too far back or could get out of the way, he told him, "Well, it doesn't look good to me," manifesting and showing, in other words, that he, the witness, knew that that was dangerous ground. He just stated to the plaintiff that it was, and then after they had this talk the last word he said to the plaintiff was, "It doesn't look good to me". And then this question tends to elicit a contradictory answer.

MR. FOX: Not at all. Not at all. If Your Honor please, the question is right here: Here is a miner who has been working for an hour or so underground, and the shift boss comes along and says,

"This isn't good ground," and the miner says, after working here for an hour and a half, "It is all right as far as I can see, and if it does come it wont hurt me", and the shifter has a right to rely upon a man of experience.

THE COURT: Well, you can argue that to the jury. It is unnecessary to ask the question of the witness.

MR. FOX: Very well.

Q. Now, Mr. Brown, what is the fact as to whether or not bars are furnished to the miners for the purpose of barring down ground?

A. Yes, sir.

MR. McFARLAND: Wait a minute. If the court please, I object to that unless it can be shown that on this particular occasion,—Your Honor can see—

THE COURT: Just make your objection.

MR. McFARLAND: I object that it is incompetent, irrelevant and immaterial.

MR. FOX: Q. Upon this day were bars furnished to the miners on the sixteen hundred foot level, and on the sixth floor?

THE COURT: If he knows. If you know you may answer, and if not, say so.

A. Yes, sir.

Q. What did these bars consist of, what kind of bars were they?

A. Made out of inch and a quarter or inch and an eighth steel.

Q. How long are they?

A. They vary in length from four to eight or nine feet long.

Q. I will ask you, Mr. Brown, did you or did you not observe any bars at the place where the plaintiff was working on that day?

A. I did.

Q. What was there in the nature of a bar or bars?

A. Well, there was a pinch bar about seven feet in length on the muck pile when I passed over.

Q. Did you go back to the place where the plaintiff was injured after that?

A. After the accident?

Q. Yes.

A. Yes, sir.

Q. How soon after this conversation that you had with him did the accident occur?

A. About ten minutes, probably.

Q. I will ask you to tell the jury, Mr. Brown, whether or not you had any conversation or in the conversation which you had stated to the plaintiff that he shouldn't be doing what he was doing, but should go to work and drill in that rock, that is, that he should stop trying to make the place safe,—did you have any such conversation with him?

A. No, sir.

Q. Did you hear the vile language that the plaintiff used upon the stand, that he laid to you?

A. Yes.

Q. Did you use that language towards him?

A. No, sir.

Q. When you first went into the place where the plaintiff was working, I will ask you to tell the jury

whether or not the plaintiff was engaged in drilling or engaged in making the place safe, or testing the place?

A. He was drilling.

Q. Could you tell the jury how far he had drilled into the hole, do you recall that?

A. No, sir.

Q. In what position was he,—standing or sitting?

A. Standing.

Q. Just tell the jury what the fact is as to whether or not timber is furnished in the stopes to put in sprags?

MR. McFARLAND: We object to that as immaterial and not pertinent to any of the issues in the case.

THE COURT: Sustained.

MR. FOX: I think you may inquire.

CROSS EXAMINATION by

MR. McFARLAND:

Q. How long after you had this conversation with the plaintiff before this slab fell?

A. In the neighborhood of ten minutes.

Q. You hadn't any more than left him, had you?

A. I had gone a hundred feet or a little better.

Q. Now, you saw that crevice plainly, did you?

A. Yes, sir.

Q. And it was a dangerous place, wasn't it?

A. It looked dangerous.

Q. You considered it dangerous?

A. I did at sight, yes.

Q. You had been a miner yourself, hadn't you?

A. Yes, sir.

Q. You had been a miner how long up to that time?

A. About twenty-six years.

Q. And any one could have seen that crevice as well as you could?

A. Yes, sir.

Q. And you told him it didn't look good to you?

A. Yes, sir.

Q. You told him that several times.

A. Twice.

Q. He told you that he was too far back to get hurt, did he?

A. He told me he had tried to bar it down, and anyway he was too far back, out of the road.

Q. But he was right under the slab all that time, wasn't he?

A. Not directly under.

Q. He had to keep hold of this machine while he was operating it?

A. Yes, sir.

Q. And the machine was right under the slab, wasn't it?

A. Under the back part of it.

Q. When the slab fell it fell on the machine and buried the machine, didn't it?

A. Yes, sir.

Q. Didn't it occur to you there, Mr. Brown, that if that slab fell it must necessarily fall upon the plaintiff?

A. Yes, sir.

Q. Why didn't you take some precaution to prop up that slab or crib it up, to make that place safe?

A. Because he told me he had examined it and was satisfied that it was safe.

Q. But you knew as well as he did that it wasn't safe, didn't you?

A. I would probably have known if I had took the time to examine it that he did.

Q. Wasn't it part of your duties to protect the workmen against such dangers as that?

A. To make them protect themselves.

Q. You didn't order any one to put a stull under that slab, did you?

A. No, sir.

Q. Or to crib it up in any way?

A. No, sir.

Q. And you didn't suggest to him to put a stull under it, did you?

A. No, sir.

Q. Or to crib it up?

A. No, sir.

Q. You say you know that bars were furnished to the men that afternoon?

A. Yes, sir.

Q. How do you know?

A. Because he told me he had been barring down, and I noticed the bar laying there.

Q. Didn't he tell you that he was trying to bar down with the drill?

A. No, sir.

Q. And didn't he tell you that he couldn't find any bar?

A. No, sir.

Q. And wasn't he feeling that back or roof with his hand when you came in there?

A. No, sir.

Q. You say you didn't use that language that he attributes to you?

A. No, sir.

Q. Isn't it a fact that you commonly, oftentimes use just such language as that to men?

A. No, sir.

Q. How did you get this rock off of him after this accident occurred?

A. The men helped me.

Q. Did you use any tools or instruments?

A. No, sir.

Q. Didn't you use any bars?

A. No, sir.

Q. Didn't it become necessary to put bars under that rock to lift it up?

A. No, sir.

Q. How did you get it off of him?

A. The rock that was on him we rolled off with our hands.

Q. How about the smaller particles of rock that was on him?

A. We rolled those off by hand.

Q. You know this man Tom who testified for the plaintiff today, don't you?

A. Yes.

Q. Didn't you see him looking for a bar around there?

A. No, sir.

Q. Who provides these different crews with bars? Who does that?

A. They have a nipper.

Q. When does he distribute these instruments, the drills and bars, and things for the men to work with?

A. They are distributed every day.

Q. Isn't it a fact that when a shift goes off of work the nipper gathers up the tools and takes them to the blacksmith shop and has them sharpened, and then is supposed to return them, or others in their place?

A. The dull ones, yes.

Q. You don't know whether the nipper had done this in this case, at this particular time, or not, do you?

A. No, sir.

Q. How long did you say he had been at work before you went to him and had this conversation?

A. Between an hour and a half and an hour and three quarters.

Q. How do you know that? How do you fix the time?

A. The time he was supposed to get to work.

Q. You are just guessing at it, are you not?

A. Yes, sir.

Q. From the time he was supposed to go on duty?

A. Yes, sir.

Q. But you don't know how much time he spent in looking up tools, do you?

A. No, sir.

Q. You don't know how much time he spent in examining that back or roof, do you?

A. No, sir.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by
MR. FOX:

Q. You mean from the time he went down to his level to the time you came to his place of work consumed an hour and a half, is that it?

A. Yes, sir.

Q. Counsel asked you whether you put up any stull or directed him to put up any stull, and you said no. Why did you not direct him to put up a stull there?

MR. McFARLAND: We object to that, if Your Honor please, as irrelevant, incompetent and immaterial, and calling for the opinion and conclusion and state of mind of this witness.

THE COURT: Overruled.

MR. FOX: Q. Why didn't you put a stull there, or direct him to put a stull there?

A. He satisfied me that it was safe.

MR. FOX: That is all.

RE-CROSS EXAMINATION by
MR. McFARLAND:

Q. So he satisfied you finally that it was safe, did he?

A. Yes, after telling me that—

Q. Why did you say to him as your last parting words that it didn't look good to you?

A. Because it didn't look good.

Q. And it did not look good, did it, any time?

A. No, sir.

Q. Now, when you were there having this talk with Louis, did you see Andy Berg?

A. No, sir.

Q. He wasn't there?

A. No, sir.

Q. He wasn't in sight, was he?

A. No, sir.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by

MR. FOX:

Q. Mr. Brown, something has been said in reference to a nipper. What are the nipper's duties?

A. To pick up the dull steel and picks and bars and take them out.

Q. When are the bars brought into the stopes?

A. They come back when the shift comes on.

Q. When are the bars taken out? Under what circumstances are the bars taken out?

A. Only when they are dull or broken.

Q. And there is a nipper on each shift, is there?

A. Yes, sir.

MR. FOX: That is all.

MR. McFARLAND: That is all.

MR. FOX: Mr. Conlon will take the stand again just for a moment.

JOHN CONLON, a witness heretofore duly sworn

on behalf of defendant, upon being recalled, testified as follows:

DIRECT EXAMINATION by

MR. FOX:

Q. Mr. Conlon, after the accident to the plaintiff did you go back to work in the same place?

A. The following day I did.

Q. That would be the next morning shift?

A. The next morning.

Q. What was the condition of the place at the time you went on shift again?

MR. McFARLAND: We object to that as irrelevant, incompetent and immaterial, and too remote. There might have been all kinds of changes made.

THE COURT: Read the question.

(Last question read.)

THE COURT: Sustained.

MR. FOX: Did you at that time find a bar which you had used on the day before?

MR. McFARLAND: I object to that, if the Court please, as irrelevant, immaterial and incompetent, for the reason that the bar might have been taken away and taken back there.

MR. FOX: I think under the conditions it couldn't have been, counsel, if you will allow the question.

THE COURT: I can't see why it couldn't have been, Mr. Fox.

MR. FOX: There is a very good reason, if Your Honor please. The bar was buried under this stuff that came down.

THE COURT: You haven't shown that.

MR. FOX: I desire to show it by this witness.

Q. Where was this bar that you had used the day previous?

A. The following morning when I went to work?

Q. Yes.

A. It was under that boulder that came down.

Q. What was the condition of it at that time?

MR. McFARLAND: We object to that as immaterial.

THE COURT: Overruled.

A. The bar was doubled up.

MR. FOX: You may inquire.

CROSS EXAMINATION by

MR. McFARLAND:

Q. Now, were you there when they took this rock off of the plaintiff?

A. No, sir.

Q. You don't know whether that bar had been taken there for that purpose or not, do you?

A. I think it would be an impossibility, for I don't think they touched the boulder after the man was taken out that night.

Q. You know it was lifted off of him?

A. No, it couldn't have been. The big one wasn't on him.

Q. Did the boulder lay in the same place that it fell?

A. Yes.

Q. Then it wasn't moved after it fell there until you saw it the next morning?

A. No, it couldn't be moved.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by

MR. FOX:‘

Q. How many pieces had that boulder been broken into, the piece that fell off?

A. They used the jack hammer on it afterwards, the small machine, and blasted it.

Q. Did it break into one piece?

A. There was a couple of small pieces.

Q. You are not referring to the piece that hit him, when you refer to the piece that was lying on the—

MR. McFARLAND: We object to that as leading and suggestive, if Your Honor please.

MR. FOX: It can be made clear.

THE COURT: I think that has been explained.

MR. FOX: Very well. That is all then.

I will call Doctor Eikenbary.

C. F. EIKENBARY, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. FOX:

Q. Will you state your name, Doctor?

A. C. F. Eikenbary.

Q. Where do you reside?

A. Spokane.

Q. You are a physician and surgeon, are you not, Doctor?

A. Yes.

Q. Where were you educated?

A. In Rush Medical College, in Chicago, and the

Hospital for Ruptures and Cripples in New York, and the Home for Crippled Children, in Chicago.

Q. How long were you in this hospital for the ruptured and crippled?

A. About a year and a half.

Q. And subsequent to that time where did you go?

A. I was in school before that time, and then after that I moved back to Chicago, and was one of the attending surgeons for the Home for Crippled Children.

Q. How long were you attending physician and surgeon for that home?

A. Until I left Chicago to come here,—about three years.

Q. And then you came to Spokane, did you?

A. Came there in 1907.

Q. And you have been there ever since?

A. Yes, sir.

Q. Have you specialized in anything?

A. My work is surgery, bone troubles, joint troubles, and deformities.

Q. Deformities which are the result of accident as well as birth?

A. Yes, sir.

Q. Doctor, have you made any examination of the plaintiff in this case, to determine the nature and extent of the injuries, if any, from which he is now suffering?

A. I made an examination yesterday morning, yes, sir.

Q. Where did you make that examination?

A. In the hospital.

Q. Who was present?

A. Dr. Worthington and an interpreter.

Q. And the plaintiff?

A. The plaintiff, yes, sir.

Q. Did you talk to the plaintiff in the English language, or did you—

A. I talked mostly through an interpreter, practically entirely through the interpreter.

Q. What did this examination consist of, Doctor?

A. Well, it consisted chiefly in just a physical examination, without any very great regard to the history of the case, because the history was rather hard to obtain. I examined his spine as well as I could, and examined his ankle, of which he complained, and the shoulder; and also made a rather superficial examination of a tumor mass in the abdominal wall, which he called my attention to; and tested his reflexes.

Q. Referring to the tumor mass, Doctor, could that be the result of an injury to the shoulders and back and head?

A. I wouldn't think so.

Q. What, if any, condition did you find in reference to his ankle?

A. He complained of pain when the ankle is moved, although he himself can move it backwards and forwards to practically the normal range of motion. When he attempts to pull the ankle up in this direction (illustrating) as far as possible, it

doesn't come quite in the normal position. He can turn it down as far as normal, and it is possible to move it passively, that is, take your hand and move it to the normal position. He complained of it, when it was done, that it produced some pain.

Q. Were you able to discover any injury or any condition of that foot which might be the result of an injury by a rock falling upon it?

A. Well, there isn't anything to be found by the examination. He says he has pain, but there is nothing in the movement of the foot that would necessarily indicate an injury, no.

Q. Nothing that would indicate an injury to the bones or ligaments or muscles of the foot?

A. Nothing that would necessarily indicate an injury, no.

Q. I understand you then, Doctor, that the only thing that throws any light on it at all, with reference to whether or not he had an injury there, was the fact that he complained of pain?

MR. McFARLAND: We object to that, if the Court please, as leading and suggestive.

MR. FOX: This is an expert witness. I think I have a right to ask it.

THE COURT: Sustained.

MR. FOX: Q. Doctor, did you then examine the arm of which he complained?

A. I did, yes.

Q. What did you find there?

A. There is a limitation to the movement of the arm when you attempt to get it to what is known as

the extreme abduction, that is, elevating the arm to the extreme limit. He can move it forward to the normal range, and backward to the normal range, but when you attempt to move it up it doesn't go quite as high as it does on the other side. Apparently he was not able to put the arm up as high on the right side as he was on the left, but the movements aside from that were normal, unless possibly there was a slight limitation to the rotation of the joint. When you attempt to rotate it this way (illustrating), there is a very slight—

Q. Is there such a limitation of the motion of the arm as would incapacitate the plaintiff from performing the ordinary manual labor, such as is done in mines?

MR. McFARLAND: We object to that, because the witness hasn't qualified to answer the question. He hasn't shown that he knows what is required of a miner in a mine.

THE COURT: Overruled.

A. So far as the motion goes, it would not incapacitate him, not unless it is a question of pain.

Q. Is that same thing true in reference to his foot?

A. So far as the motion is concerned, it wouldn't incapacitate him.

Q. Now, Doctor, did you make a test to determine whether or not there was any injury in that arm to any of the nerves of the arm?

A. I did. I tested the sensation in the skin, which is best done by using a very small wisp of cotton,

something exceedingly soft, that would be felt very, very slightly. Over the outer side of his arm about the middle there was an area which ordinarily he didn't feel when I would brush the cotton over it, but it wasn't a perfectly definite area; that is, sometimes he would not feel it here, and then next time it would be a little higher where he wouldn't feel it. Down in the hand he complained of a loss of sensation in the thumb, the back of the thumb and the back of the index finger, and, testing with a piece of cotton by just barely touching it, apparently there was very little sensation, if any, in that particular region. But the sensation over the middle finger was normal, and the sensation over this finger (illustrating) is normal, over the ring finger is normal.

Q. How about the fourth finger and the little finger?

A. You mean the ring finger and the little finger?

Q. Yes.

A. They were normal.

Q. You say he complained of a loss of sensation in the thumb and in the index finger?

A. In the back of the thumb and the index finger, yes, the back of the thumb and the back of the index finger.

Q. What nerve supplies the back of the thumb and the back of the index finger?

A. The radial nerve.

Q. Does the radial nerve supply any other fingers excepting the thumb and the index finger?

A. The radial nerve supplies the back of the

thumb, the back of the index finger, the middle finger and half of the back of the ring finger. In other words, it supplies this

Q. If there is an injury to the nerve supplying the top of the thumb, the index finger, the middle finger, and half of the ring finger, that is, the radial nerve, what is the fact, Doctor, as to whether or not the loss of sensation will be uniform in those fingers which that nerve supplies?

A. It would necessarily be uniform at those fingers, the three fingers and a half.

Q. What is your deduction then when you find that the plaintiff in this case claims to have a loss of sensation of the thumb and the index finger, but not a loss of sensation of the middle finger, or of that half of the ring finger supplied by the radial nerve?

A. I think the kind of deduction I would make was that he didn't understand what I wanted him to do. That is, I wanted him to say yes when I touched him, and he possibly felt it and didn't understand.

MR. McFARLAND: We object to that, if the Court please, and ask to have it stricken out. It is simply an opinion of the witness as to the mental condition of the plaintiff at that time, and as to what he thought he meant, without his knowing.

THE COURT: Sustained:

MR. FOX: Q. Doctor, what I am trying to get at is, from your examination of this plaintiff, bearing in mind the test which you made upon his fingers to determine whether or not there was anything the

matter with the nerve supplying the fingers, did you come to a conclusion as to whether or not there existed in the plaintiff an injury to the nerve?

A. I should say there is no injury to the radial nerve.

Q. Is there any injury that you were able to find to any of the nerves supplying the arm, the upper arm and the forearm, and the hand?

A. No.

Q. Now with reference to the spot on his upper arm where he claimed anesthesia, what have you got to say as to that?

A. I have already explained that the area of anesthesia was not definite.

Q. What do you mean by not definite?

A. I mean that one time when I would go over it, the area of anesthesia would be higher than at another; that is, he would feel it one time here (indicating), and the next time he wouldn't feel it there. So that if he felt it once the deduction would necessarily be that the nerve is able to functionate, otherwise he wouldn't be able to feel it at all.

Q. If there is a disorder of the nerve the loss of sensation should be definite and the same continuously?

A. Yes, it would be.

Q. And it was your deduction from that, Doctor, or what was your deduction from that as to whether or not there was an injury to the nerve supplying that portion of the arm in which he claimed this anesthesia?

A. I should say there was no injury to the nerve itself.

Q. Doctor, did you inquire as to whether or not the plaintiff had at any time suffered from any disease?

A. I did, yes.

Q. I am referring particularly as to whether or not he suffered from any venereal disease.

MR. McFARLAND: I object to that as irrelevant, incompetent, and immaterial, and not pertinent to any of the issues, if Your Honor please.

MR. FOX: It is only preliminary.

THE COURT: Objection sustained.

MR. FOX: If Your Honor please, it can be shown medically that the condition of which the plaintiff complains at the present time may be the result of such a disease.

THE COURT: That question isn't before the court. It is a question of whether or not you are showing it in a competent way.

MR. FOX: Q. I will ask you, did you inquire of him as to whether or not he had been afflicted with a disease known as gonorrhea?

MR. McFARLAND: We object to that as incompetent, irrelevant and immaterial.

THE COURT: Overruled. Answer yes or no.

A. Yes.

MR. FOX: Q. What did he say as to whether or not he had been afflicted with such a disease?

MR. McFARLAND: We make the same objection, if the Court please.

THE COURT: Overruled:

A. He said he had.

MR. FOX: Q. Doctor, can you account for the pain which he claims to have in his heel upon the ground or by reason of the fact that he has suffered with that disease?

A. The pain which he has, which he complains of having under the heel, is a pain that is usually caused by bony spurs, bony outgrowths, and little sharp pointed spurs, growing out at that point, and is the remote effect of gonorrhea, is the remote effect of infection. Just why it occurs there is hard to explain, but it is common for that to happen. That pain he has there would be the reasonable way to account for that.

Q. Doctor, I will ask you whether or not a limitation of the arm, of the motion of the arm, which you found in the plaintiff, can be accounted for upon the same principle?

A. It would be possible, yes. Any inflammation of the joint would limit the motion in the joint, and any joint may be inflamed as a result of infection of that kind, or any other infection.

Q. Is that a common thing?

A. It is exceedingly common.

Q. To find a limitation of the arm?

A. It is not quite as common in the arm as it is in the knee. But it occurs in every joint.

Q. Every joint?

A. Yes.

MR. FOX: You may inquire.

CROSS EXAMINATION by

MR. McFARLAND:

Q. How did you ask him if he had been afflicted with gonorrhea?

A. Through the interpreter.

Q. How did you state your question?

A. I stated it in two or three different ways before I finally made him understand.

Q. Give the different ways.

A. I asked him if he had had gonorrhea, and then I asked him if he had had clap.

Q. What did you say when you asked him if he had had gonorrhea?

A. I don't think the interpreter understood me.

Q. Do you think the interpreter understood you when you asked him if he had had clap?

A. Yes, I think he did.

Q. The only evidence that you had that indicated that he had any of these troubles was the answers you received through the interpreter?

A. Yes.

Q. If he had denied having had those diseases or troubles there was nothing appeared from his person or from a physical examination showing that, was there?

A. Yes, there was.

Q. What was there?

A. The pain in the bottom of the heel. That was why I asked the question.

Q. Wouldn't that be the result of an injury just as well as this other?

A. It is so uniformly the result of gonorrheal infection—

Q. Never mind. Couldn't that be the result of a rock falling on his foot?

A. Yes, if it fell on the center of his heel it might cause it.

Q. Couldn't a rock fall on his instep or the bridge of his foot and cause the injury?

A. No.

Q. Why not?

A. Because it is the result of an outgrowth of bone on the bottom surface of the heel bone.

Q. Did you observe any puffiness in or about the heel?

A. No, there wouldn't be any.

Q. Was that right heel just the same as his left, as far as appearances were concerned?

A. I don't remember, but it undoubtedly would have been.

Q. You have testified about some disability of his right arm and shoulder. Could you tell how long that existed?

A. No, I could not.

Q. If he sustained the accident which he claims to have sustained, on the 8th day of May, and up to that time he had been a well man, would you attribute the condition to gonorrhea or syphilis or clap?

A. No; I would attribute his condition to the injury.

Q. To the injury?

A. Yes.

Q. How long after the inception of a disease of that kind would these evidences appear, these symptoms?

A. They may be any length of time; any old infection can produce at any time joint disturbances.

Q. Is gonorrhea a separate and distinct disease?

A. Yes.

Q. Doesn't that originate in what is commonly called clap?

A. It is simply different terms for the same disease.

Q. Isn't it an older stage, or an aggravated stage, of what is called clap?

A. No; they are one and the same.

Q. You don't mean the jury to understand you as saying that his difficulties or disabilities are due to—

A. No, I didn't say that at all. I said I thought possibly the pain he had on the under side of his heel might be due to that.

Q. And at the same time it might be due to that injury he complained of?

A. I don't think so.

Q. How about this tumor of the stomach?

A. He has a mass which is nodular, about the size of a—I should say probably the size of a hickory nut, with little outgrowths from it, which is not in the abdominal cavity, but in the abdominal wall, which can be rather easily felt in feeling over the abdominal wall.

Q. Did he claim any pain when you manipulated that?

A. Yes, he said there was some pain.

Q. Did you examine his back or spine?

A. Yes.

Q. Did you discover any disability there?

A. He claimed that he had some pain, but he was able to stand, standing straight and keeping his knees perfectly straight, to bend and touch his hands to the floor, which I took it would eliminate any injury to the spine.

Q. Did he state whether or not going through those exercises gave him any pain?

A. He said it gave him pain.

Q. Isn't it possible for him to have been injured in the back or spine and go through those exercises, stoop over and go to the floor?

MR. FOX: It isn't a question of possibility.

THE COURT: Answer the question.

(Last question read.)

A. I wouldn't say it was not possible.

Q. Did you examine his ear?

A. His ear?

Q. Yes.

A. No, I didn't. I had no way of examining his ear, and I merely judged of his hearing by the ordinary conversation, by him being able to apparently hear the ordinary conversation.

Q. You didn't make any inspection of his ear?

A. No, sir.

Q. Did you examine his head for any depression?

A. We did, yes.

Q. Did you find any?

A. Well, there is, over the back of his head there is a region there that you might say was a little depressed. I wouldn't call it a depression, because these little variations occur in practically everybody.

Q. You couldn't tell whether it was a depression or whether it was a natural indenture of the skull?

A. No, sir.

Q. If it is a depression it is liable to result seriously, isn't it?

A. That would depend entirely upon what follows beneath it, whether it had pressed upon the brain or not.

Q. Did you examine the side of his head in the region of his temples?

A. No, I did not.

Q. You didn't make any examination to ascertain whether or not there was any numbness there, or any lack of feeling?

A. Not in that particular spot, no.

Q. Now, would you say that his right arm and shoulder is as good as it ever was?

A. No, I wouldn't say so.

Q. He won't be able to use it as well as he could prior to this injury or this accident, if the accident injured him in that way?

A. You say would he be able to use it as well?

Q. Yes, will he hereafter?

A. It will depend entirely upon the amount of recovery that takes place.

Q. Assuming that he was injured in his arm and shoulder on the 8th day of May, wouldn't it be about

time, if he was treated every ten days, for that shoulder and arm to show some improvement?

A. Why, I don't think it is up to me to pass on the treatment a man has had.

Q. You recognize the treatment of those kind of injuries by electricity, do you not?

A. Not to any very great extent, no.

Q. Would that be a proper treatment?

A. It might be a proper treatment if the doctor thought there was some injury to the nerve itself, that might be all right.

Q. Are you acquainted with Doctor Mowry of Wallace?

A. Yes, sir.

Q. Is he a competent physician?

MR. FOX: I object to that as incompetent, irrelevant and immaterial, and not proper cross examination.

THE COURT: Sustained.

MR. McFARLAND: That is all.

RE-DIRECT EXAMINATION by

MR. FOX:

Q. Doctor, counsel asked you as to whether or not, if the depression in the skull were the result of an injury, it would be serious, and you said it would be if the evidence afterwards showed that there had been a pressure on the brain.

A. I said it would depend entirely on whether or not the depression was carried clear through into the brain itself.

Q. Is there any evidence in this man that the depression has been carried through?

A. None that I found, no.

Q. Is there any evidence that he is suffering by reason of an injury to the top of his head which might have caused that depression?

A. I don't think there is any evidence, no.

Q. Doctor, you say that you didn't examine the side of the face?

A. No.

Q. Why didn't you?

A. My attention wasn't called to any numbness or any trouble at that point. The only thing on the side of the face at all was the hearing, the ear, the question of his hearing.

Q. He didn't complain of anything?

A. No.

Q. Is it possible, Doctor, to state mathematically the amount of limitation there is in that right arm that you discovered?

A. Yes, it is possible, only of course your mathematics is not as exact as you would like to have it.

Q. Could you state it mathematically, so that we may know just—

A. I should say that he had a normal range of motion in extension forward, and the backward movement of the arm, I should say that was normal, and the extension in this direction (illustrating) is normal, but the extension upwards is not quite normal.

Q. How far below the normal would you say that was there?

A. Well, I could probably state it better by say-

ing that he has, in extension he probably has seventy-five per cent of the normal range of motion; that probably would be as near stating it mathematically as you could get.

Q. Doctor, you also stated in answer to a question propounded by counsel that it might be possible that he could stoop over and touch the floor with his hands, stooping, and yet have sustained the severe injury to his back. Would it be probable?

A. It would be very improbable.

MR. McFARLAND: We object to that, if the court please.

THE COURT: Overruled.

MR. FOX: Q. You say it would be very improbable?

A. I should say it would be very improbable.

Q. Is there any evidence in this man of a permanent injury to the spine or back?

A. I don't see any, no sir.

Q. Doctor, I will ask you to state to the jury, based upon your examination and experience, as to whether or not, in your judgment, this man is incapacitated from performing manual labor?

MR. McFARLAND: We object to that as incompetent, immaterial and irrelevant, if the Court please, and because the witness hasn't qualified himself to answer that particular question, it is a matter of conjecture.

MR. FOX: It is the usual question, if Your Honor please.

THE COURT: Objection sustained.

MR. FOX: An exception. That is all, Doctor.
RE-CROSS EXAMINATION by

MR. McFARLAND:

Q. Doctor, if the plaintiff had suffered a depression of the skull, which caused a pressure on the brain, wouldn't that produce this numbness and lack of feeling that he complains of?

A. In his fingers?

Q. Yes.

A. No.

Q. Wouldn't it in his arm?

A. It might produce a numbness, but it would have to be a definite numbness.

Q. It would produce some lack of feeling, wouldn't it?

A. It might.

Q. That might result finally in total paralysis of one side?

A. No, not likely, in that region.

Q. Well, it is possible, is it not?

MR. FOX: I object to the possibilities. It is the probabilities.

THE COURT: Overruled.

A. No, I should say that in that region it was not possible.

MR. McFARLAND: That is all.
RE-DIRECT EXAMINATION by
MR. FOX:

Q. Doctor, a depression of the skull at the place where you found this little depression there, if that depression were caused by an injury, as I under-

stand you to say, it would not produce the numbness of which he complains? It would not produce the numbness of which he complains in the upper region of the arm and in the fingers?

A. It would not, no.

MR. FOX: That is all.

MR. McFARLAND: That is all.

THE COURT: Doctor, there is one question I want to ask you. You stated that a certain injury would not benumb one finger of the hand unless it benumbed others or reduced the degree of sensation. You mean it would be impossible for one finger to be without sensation and another to have it?

A. It would be impossible for one finger to be without sensation, that is, it would be impossible for the back of the thumb, for instance, to be without sensation as a result of an injury to the radial nerve, without also the index finger, the middle finger, and half of the ring finger also being without sensation.

Q. Suppose a man were injured by having heavy stones fall on him, would it be possible for him to be injured in such a way that one finger, that is, say the thumb, is without sensation, and the index finger or first finger still has sensation?

A. It would be possible if the injury were down here in the thumb; it would have to be down here. It couldn't be up here (indicating).

Q. In other words, it would have to be to the nerve that supplies the thumb and the thumb alone?

A. Yes, sir.

THE COURT: That is all.

RE-DIRECT EXAMINATION by

MR. FOX:

Q. Is there a nerve which supplies the thumb alone?

A. Well, the branches from this radial nerve. The radial nerve comes down in this way (illustrating), and branches to supply those three fingers and a half.

Q. Then the injury would have to occur,—in order to render the thumb alone numb by reason of an injury to the nerve, the injury would have to occur below the point of the nerve, below the point where it branches off from that portion of the radial nerve which goes into the other fingers?

A. Yes, sir.

MR. FOX: That is all.

RE-CROSS EXAMINATION by

MR. McFARLAND:

Q. You were requested to make this examination by the defendant or the defendant's attorneys, weren't you?

A. Yes, sir.

Q. You were representing the defendant company when you made that examination?

A. I don't think you could say I was representing them.

MR. FOX: He made that examination for us.

MR. McFARLAND: If the Court please, we will have some rebuttal, and on account of Doctor Worthington being so busy since this examination was made I haven't had an opportunity of talking with him, I would like to confer with him to ascertain

whether or not I should put on any more of that testimony, or any testimony in rebuttal to the testimony of Doctor Eikenbary.

MR. FOX: I have no objection whatever. I can let my witnesses go, I think.

THE COURT: Do you rest?

MR. FOX: We rest.

THE COURT: We can't adjourn until tomorrow morning, gentlemen; we must submit this case tonight.

MR. McFARLAND: Very well. Until seven o'clock this evening then? Just so I have an hour's time to talk with my client and one witness and Doctor Worthington.

THE COURT: Very well. We will make it at seven-fifteen. Gentlemen, remember the admonition I have heretofore given you, and return at seven-fifteen this evening.

An adjournment was thereupon taken until 7:15 p. m., Thursday, Nov. 23, 1916.

7:15 p. m., Thursday, Nov. 23, 1916.

C. E. WORTHINGTON, heretofore duly sworn on behalf of plaintiff, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION by

MR. McFARLAND:

Q. You heard Doctor Eikenbary's testimony, did you not?

A. Yes, sir.

Q. Were you present at the time he made the examination of the plaintiff?

A. I was yesterday morning.

Q. That was in your hospital?

A. At my place, yes, sir.

Q. And you had made an examination of the plaintiff before that, had you?

A. I had, two or three days before that.

Q. Now I will ask you, did you hear Doctor Eikenbary ask the plaintiff, through the interpreter who was present at that time, whether he had ever had clap, syphilis, or gonorrhea, at that time?

A. Yes, sir.

Q. What was the answer of the plaintiff?

A. He said he had never had it.

Q. Did you hear him ask him whether he had been married?

A. Yes, sir, he asked him that question two or three times.

Q. What did he say?

A. He said he had not.

Q. You heard what Doctor Eikenbary stated about his ear?

A. Yes, sir.

Q. Did you call his attention to the ear?

A. I did.

Q. Did he make an examination of the ear?

A. No, he didn't make any examination. He said he wasn't a specialist on the ear, and he didn't care to make an examination of the ear.

Q. And he didn't examine the ear?

A. No, sir.

Q. What about the temple?

A. His attention was called to that.

Q. By whom?

A. I called his attention to it, and the plaintiff there called his attention to it, but I think Dr. Eickenbary didn't understand him.

Q. But he didn't make any examination?

A. No, I don't think the Doctor understood him. He didn't make any examination.

Q. Did the doctor proceed to examine his back?

A. He did.

Q. Tell the jury just what he did.

A. First he placed him on his stomach, and pressed his back, pressure on both sides of the spine, and the muscles of his back, and then he had him turn on his back again, and he put his arms under his legs and doubled his limbs up over his body, and then after doing that he twisted his limbs around so as to bring a twist in his back, first one way and then the other.

Q. What is the fact as to whether the plaintiff indicated any pain?

A. He indicated considerable pain, I thought.

Q. How did you determine that fact?

A. Well, he groaned when he done that.

Q. Did he wince any?

A. Yes, he did.

Q. Now that trouble about the stomach, that tumor?

A. Well, this a growth there of some character. I don't know what it is.

Q. Did you and the doctor agree as to the extent or seriousness or the non-seriousness of it?

MR. FOX: I don't think that is proper.

MR. McFARLAND: I will change that.

Q. Did you determine whether it was serious?

A. We were practically of the same opinion.

MR. FOX: I make the same objection. It is not proper rebuttal, if Your Honor please.

THE COURT: Sustained.

MR. McFARLAND: Q. Doctor, in regard to those lumps under the heel, you discovered those, did you?

A. I discovered a tenderness there.

Q. What do you call those.

A. Nodules on the bond.

Q. If they had been caused by venereal disease would they have developed recently?

MR. FOX: I don't see how the doctor can possibly answer that question.

MR. McFARLAND: Q. Well, if you know.

A. They wouldn't devèlop,—I wouldn't think they would develop to the extent they have, suddenly; they would come on gradually.

Q. Assuming that he received these injuries that he claims he received on the 8th day of May, and hadn't had that trouble to his foot, would they have come on to the extent that they appear from that time on?

A. I hardly think they would.

Q. I will ask you to state, from your experience and observation as a physician and surgeon, and from your examination of the plaintiff, whether or not the injuries and disabilities which you discovered

upon your examination of him could have been sustained by heavy rocks falling on him?

MR. FOX: It isn't proper rebuttal testimony, if Your Honor please. It has been gone over by this physician on direct examination.

MR. McFARLAND: It is contradicting Dr. Eikenbary.

THE COURT: No, I don't think it is. Dr. Eikenbary didn't testify—

MR. McFARLAND: Well, then I am satisfied to leave it the way it is, if that is the case. You may inquire.

CROSS EXAMINATION by

MR. FOX:

Q. You say Dr. Eikenbary told you he wasn't a specialist on the ear?

A. Yes, sir.

Q. And therefore he refused to make an examination of the ear?

A. He simply said, "I am not a specialist on the ear," and he didn't make any examination.

Q. And he felt as a physician that he shouldn't testify about—

A. I don't know how he felt about it, but he didn't make it.

Q. And you are not a specialist?

A. I am not.

MR. FOX: That is all.

LOUIS ANDERSON, heretofore duly sworn in his own behalf, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION by

MR. McFARLAND:

Q. Do you know Andy Berg?

A. Yes.

Q. Just before you got hurt in this mine did he come around and tell you that that was a dangerous place to work?

MR. FOX: I object as not proper rebuttal testimony. It was gone into in chief. He denied the conversation, and I proved it by way of impeachment.

MR. McFARLAND: We have a right to direct his attention to it afterwards, if the Court please. I presume that Mr. Fox endeavored to lay the grounds and foundation for an impeaching question.

MR. FOX: I did.

MR. McFARLAND: And yet at the same time we have a right to ask whether that conversation took place.

MR. FOX: He is simply denying it. There was no change in the conversation. If counsel can indicate that it was different—

THE COURT: Yes. If he has denied it once a second denial wouldn't add anything to it.

MR. McFARLAND: Very well. I am satisfied with that.

Q. Did Andy Berg call your attention to any crack in the back or roof of the mine at that time?

A. No.

Q. Was there any crack in the roof or back of the mine that you could see?

A. No, sir.

MR. FOX: I move that the answer be struck out until I have an opportunity to make my objection. That is not proper rebuttal testimony. The condition of the place has been amply testified to by this witness. Now he can't amplify it in any way.

THE COURT: I don't remember that he was asked the question as to whether or not there was a crack there.

MR. FOX: Very well; if the Court doesn't remember it. He has answered the question.

MR. McFARLAND: Well, then, you agree that he has denied that he said that he could get out of the way of that if it fell down?

MR. FOX: Make your proof, counsel.

MR. McFARLAND: All right, then.

Q. Did you tell Mr. Brown, the shifter, or did you tell Andy Berg, or either of them, that you could get out of the way if that slab fell down?

MR. FOX: I object to that.

A. I never said that.

MR. FOX: As not being proper rebuttal.

THE COURT: Yes, that is true.

MR. McFARLAND: Well, I asked counsel to agree to that.

Q. Did you ever have anything the matter with your privates, any disease, to your penis, or your pecker?

A. No.

Q. You remember Dr. Eikenbary examined you up at the hospital the other day?

A. Yes.

Q. Did you tell him that you had had the clap?

A. No, I never did.

Q. Did you tell him that you had had clap? Did you tell the doctor that you had had clap?

A. No, sir.

Q. Did you tell him that you had had gonorrhea?

A. Yes.

Q. What do you mean by gonorrhea?

A. I couldn't tell.

Q. Now listen, Louis. Did you tell him that you had anything the matter with your pecker, down here (indicating)?

A. No, sir, I aint got no trouble of that kind at all.

Q. Did you ever have?

A. Never had.

Q. What did you tell him you had trouble with, —a rupture?

A. Yes, sir.

Q. Where is that rupture?

A. Right in here, in my right side.

Q. Did you tell him that you had had syphilis?

MR. FOX: The doctor didn't say that, if Your Honor please. It is not proper rebuttal. The doctor didn't claim that this man ever said he had syphilis.

THE COURT: I think that is true.

MR. McFARLAND: You may inquire.

CROSS EXAMINATION by

MR. FOX:

Q. When you talked to the doctor you didn't talk to him in English at all, did you?

A. Yes, I talked English and the other fellow talked too.

Q. This interpreter of yours?

A. Yes.

Q. The doctor asked him in English and the interpreter asked you the question in Finnish, and you answered in Finnish, isn't that the way it was? You didn't talk to the doctor in English, did you?

A. Yes, I talked in English.

Q. You could talk enough English to explain to the doctor what was the matter with you, you told the doctor what was the matter with you in English, is that the idea?

A. Yes,—not every time.

Q. Not every time?

A. No.

Q. Sometimes?

A. Yes, but I can understand—

Q. You know in English—

MR. McFARLAND: Let him get through.

A. I didn't understand. The other fellow was with me, and he explain.

Q. You know what the word clap means, don't you?

A. Yes.

MR. FOX: That is all.

RE-DIRECT EXAMINATION by

MR. McFARLAND:

Q. Did you tell the doctor you had clap?

A. No, sir, I never said that.

MR. FOX: I move that the answer be struck out?

THE COURT: Anything else, gentlemen?

MR. McFARLAND: Q. Are you a Finlander?

A. Yes, sir.

MR. McFARLAND: That is all.

FRANK RAALE, produced as a witness for plaintiff in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. McFARLAND:

Q. What is your name?

A. Frank Raale.

Q. How old are you?

A. I am thirty-six.

Q. What is your business?

A. Rancher at the present time.

Q. Where do you live?

A. Enaville, Idaho.

Q. How long have you lived in Idaho?

A. Thirteen years.

Q. Are you acquainted with the plaintiff, Louis Anderson?

A. Yes, sir, lately.

Q. How long have you known him?

A. I have known him for about a month.

Q. What has been your business before you went to ranching?

A. Mining.

Q. Have you worked in any of the big mines in the Coeur d'Alenes?

A. I have in several.

Q. Name them.

A. Interstate-Callahan, and the Last Chance, Federal Company, Bunker Hill & Sullivan, Hypotheek, Empire Copper Company, and several small prospects, Polaris Mining Company, development company it is called, and prospecting.

Q. How long altogether did you work in those mines?

A. From ten to thirteen months at a stretch.

Q. What particular work did you do in those mines?

A. Every line of work that there is required of a miner. There is six different classes of miners. I don't know which class you refer to.

Q. Did you ever act as a machine man, running a drill?

A. Yes, sir.

Q. Mucker?

A. Yes, sir.

Q. Do you know what is meant by a nipper in a mine?

A. I do.

Q. What are the duties of a nipper?

A. The nipper's duty is, in most of the mines, to take out the dull steel and carry in the sharp steel and picks also, and in some mines it is the custom that the nipper brings the powder around to the machine men before shooting time.

Q. After the shift goes off, the nipper takes the tools away to get them sharpened, and does he always bring them back in time for the next shift to use them?

MR. FOX: I object to that as incompetent, irrelevant and immaterial. The question is not what they always do, but what was done on this occasion, if Your Honor please.

MR. McFARLAND: If the court please, he introduced that same class of testimony.

MR. FOX: In the second place, it isn't what the custom might have been in some other mine. The question is, what were the things done in the Morning mine at or about the time the plaintiff was injured.

MR. McFARLAND: He never worked in the Morning mine.

MR. FOX: Then I don't see how he could testify as to what was done in other mines as being binding on us.

THE COURT: Objection sustained.

Q. Were you at Doctor Worthington's at the time Doctor Eikenbary examined Louis Anderson?

A. I was there yesterday morning.

Q. Did you act as interpreter for Anderson?

A. I did, sir.

Q. You heard Dr. Eikenbary ask Anderson if he had had the clap?

A. He had a different word for it.

Q. What was it?

A. It was, as near as I could understand, he didn't ask about the clap, but he asked if he had a rupture, but he said, "No use to ask him, because I can see it, because he had the bandage."

Q. Did he ask him anything about the gonorrhea?

A. No, he asked him about the syph.

Q. Syphillis?

A. Yes, syphillis.

Q. Did you interpret that question, when he asked him if he had ever had syphillis?

A. Yes, sir.

Q. What did he answer?

A. He said no.

Q. What did you tell the doctor?

A. I told him no.

Q. Did he ask him if he had ever been married?

A. Yes.

Q. And what did Louis say?

A. He said he never was.

Q. Did he ask him if he had ever been sick before?

A. Yes.

Q. Before he got hurt?

A. Yes.

Q. And did you ask Louis that question?

A. Yes, sir.

Q. What did Louis say?

A. Yes.

Q. What did you say?

A. I told him no.

MR. McFARLAND: You may inquire.

CROSS EXAMINATION by

MR. FOX:

Q. Your name is Frank Raale?

A. Yes, sir.

Q. You were up to get citizenship papers before Judge Woods —

A. I was —

MR. McFARLAND: We object to that and assign that as error, if Your Honor please.

MR. FOX: We want to make an offer of proof.

MR. McFARLAND: Well then, make it out of the presence of the jury.

MR. FOX: I am perfectly willing to do it.

MR. McFARLAND: I don't want these prejudicial questions —

THE COURT: Gentlemen of the jury, you may step out in the hallway a few minutes.

(The jury thereupon retired from the court room.)

MR. FOX: If Your Honor please, I want to make proof that this man at two terms ago, in the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, made application to the Honorable William W. Woods, then judge of that court, for citizenship to the United States, he being a subject of the Emperor of Russia, to-wit, a Finn, and that upon examination citizenship papers were denied him because of the fact that he was a person of bad moral character.

MR. McFARLAND: We object to the offer as immaterial.

THE COURT: The offer is denied.

MR. FOX: I will take an exception, if Your Honor please. That is all.

MR. McFARLAND: That is all.

WITNESS: Gentlemen, haven't I got a right —

MR. McFARLAND: You go and take your seat.

THE COURT: That is, unless you direct my at-

tention—I don't understand on what theory you offer such proof.

MR. FOX: On the question of moral character.

MR. McFARLAND: It can only be directed to impeachment, and the statute of this state —

THE COURT: Bring in the jury.

(The jury thereupon returned into court.)

THE COURT: Have you any other witnesses?

MR. McFARLAND: No. The plaintiff rests,
Your Honor.

MR. FOX: I desire to renew my motion for a non-suit, if Your Honor please, and make a motion for a directed verdict.

THE COURT: You may make it.

MR. FOX: Comes now the defendant, and moves the court to direct the jury to bring in a verdict for the defendant, for the following reasons, to-wit:

1. That the plaintiff has wholly failed to show any negligent act or omission on the part of the defendant which was the proximate or any cause of the accident or injury complained of in plaintiff's complaint.

2. That if the plaintiff was injured while in the employ of the defendant, as alleged in his complaint, he was injured by and through the negligence and carelessness of a fellow servant.

3. If the plaintiff was injured as complained of in his complaint, he was injured by and through his own negligence and carelessness, and his own contributory negligence and carelessness.

4. If he was injured as alleged in his complaint,

he was injured by and through a risk of his employment which was plain and obvious to the plaintiff, and which risk was assumed by the plaintiff.

5. It is not alleged in the complaint, and the defendant was not advised, that the plaintiff would claim in this case that he was injured by and through an erroneous and careless and negligent direction of the shift boss.

THE COURT: The same ruling as heretofore. The motion will be denied.

MR. FOX: If Your Honor please, I have written out the substance of three instructions that I would like to have Your Honor look over. I will say that they are not as carefully drawn as I would have liked to have them drawn, but the substance is there.

THE COURT: Address the jury.

(Argument to jury by counsel.)

THE COURT: Gentlemen of the jury, this case arises in this way: The law of the state provides that if one who is employed by another is injured as a consequence of the negligence of the employer, he, the injured person, may recover such damages as under all the circumstances would seem to be just. The measure of the damages I will explain to you a little later on. One of the primary duties of a master, as we say in the law, or an employer, is to use reasonable care to see that the tools furnished to the servant, here the plaintiff, and the place where he is required to work, are reasonably safe. The plaintiff alleges that the defendant in this case failed in the discharge of this obligation to him. In a general

way I may say to you that it is charged by him that while employed as a miner in the defendant's mine in Shoshone County, the defendant failed to furnish to him the necessary tools by which he, the plaintiff, could determine whether or not the stope where he was working was in a safe condition, and that it, the defendant, failed to warn him of such unsafe condition.

Now when we come to the testimony of the plaintiff, his claim more particularly seems to be that while employed as an experienced miner in the stope to which he has referred, upon going to work upon the afternoon or evening in question, he looked for a bar, pinch bar, I think it is commonly called, or sometimes called, anyway a steel bar, by which the miner determines whether or not there is any loose, overhanging rock, and by which, if he finds there are clinging rocks, he bars them down, or pries them off, as the case may be, so that there will be no danger from that source. He further testifies in substance, and I am only giving you the general substance of his testimony, that, not finding such bar, he was inspecting the place as best he could with the appliances at hand, and before he had completed the inspection so as to satisfy himself that it would be safe to go to work there with his drill, the shift boss, a Mr. Brown, came along, and asked him what he was doing, and expressed dissatisfaction with the delay, and directed him to go with his work as a machine man, and in substance assured him that the place was safe. Now, the plaintiff concedes in his testi-

mony that he was an experienced miner. He further tells you that, as such experienced and skilled miner, it would have been entirely possible and practicable for him to detect the danger in this overhanging wall, or the back, or roof, as it is called, had he had the ordinary appliances, the bar, or had he been given sufficient time to make the discovery, but that notwithstanding his skill and ability to make such a discovery had he been given the time and the instrumentalities, he yielded to the suggestion or direction of the foreman and went on with his work, relying upon the assurance of the shift boss that the place was safe. Now in this testimony he is perhaps corroborated to some extent; it is for you to say whether at all, and, if so, how much, by the witness Thomas Simih. Upon the other hand,—(I am referring to the testimony because I am going to instruct you that there is substantially but one question or issue of fact upon which you are to find, and your finding as to that fact will depend whether your verdict will be for the plaintiff or the defendant) —the testimony of the shift boss, Brown, upon the other hand, is to the effect that he observed the condition of the back of the stope, noticed that there was a long, open crack, and felt that it was a dangerous situation, that it was bad ground, as they call it, and called it to the attention of the plaintiff, with the suggestion that it was dangerous. Some reply was made by the plaintiff, and he again made the statement that it didn't look good to him, or something to that effect. But yet

that he, after warning the plaintiff in that manner, went on, and a short time afterwards the accident occurred. In some of these particulars at least he is corroborated in a measure, if you believe the testimony by the witness Andy Berg, and the witness John Conlon.

Now, if you find that the plaintiff's testimony is substantially true, and that he did not observe any crack in the back of the stope, and that he had not finished his investigation, but that he was diverted therefrom by the direction of Mr. Brown, if you believe that his testimony is substantially true, you should find in his favor. The burden is upon him of showing by a preponderance of the evidence that the conditions that he has testified to were substantially as he testified, and that he had substantially the conversation with the shift boss that he related. By a preponderance of the evidence is not meant necessarily a greater number of witnesses. Sometimes it turns out that the testimony of one witness may be more convincing, may be more persuasive to the jury or to the court, or outside of court, as far as that is concerned, than the testimony of two or three or four witnesses. It is for you to say upon which side the truth lies, and whether or not you will attach greater weight to the testimony of the plaintiff, and that of Thomas Simih, so far as it is pertinent and corroborates him, or whether you will attach greater weight or equal weight to the witnesses for the defendant, because if the testimony were equally balanced upon that issue it would be your duty to find for the de-

fendant, the burden being upon the plaintiff to show the truth of that which he alleges to be true, by a preponderance or greater weight of the testimony.

Upon the other hand, if you disbelieve him, if you find that his testimony is not substantially true, and if you find that the testimony of Mr. Brown is in accordance with the truth, is substantially true, and thus find that the plaintiff was advised of this condition, his attention was directed to it, he was warned that it was dangerous, and if thereafter, notwithstanding such warning, he continued to work and subject himself to unnecessary peril, then he assumed the risk of any danger that might ensue, of any accident that might follow therefrom; he would be chargeable himself with the negligence, he would be chargeable with the assumption of whatever risk there was after his attention was called to it and he continued to subject himself to it. I say that because he admits that he was an experienced miner, and was able to appreciate the dangers from conditions of that sort. So that the primary issue, gentlemen, upon which you are to find is as to whether or not the testimony of the plaintiff is substantially true or the testimony of the shift boss, Mr. Brown, is substantially true. If you support the plaintiff's testimony, you will find in his favor. If you do not support it, but find Mr. Brown was telling the truth substantially, then you will find for the defendant.

Now, if your finding upon this issue should be for the plaintiff, then it is for you to say what the amount of his recovery should be. The law does not pre-

scribe any definite or specific standard by which a man's damages may be measured, where he has suffered a personal injury, and you will very readily see that it would be difficult to fix any measure by which a jury could be definitely guided. An arbitrary amount might be prescribed by the statute, but the legislature has not seen fit to do that. It has left that matter to the good sense and reasonableness of a jury made up of twelve men, it being assumed that your composite judgment would probably award a just amount. So it is for you to determine, in the light of the evidence which you have,—you can't go outside of the evidence,—in the light of the evidence you have, what is a reasonable compensation to the plaintiff for his injuries, such as he suffered at that time, if you find that the defendant was responsible for them. You may take into consideration the pain, if any, which the plaintiff has suffered, and that which he is likely to suffer in the future. Take into consideration the impairment of his physical ability, his capacity to perform work, to earn money, to make a living for himself, his capacity for enjoyment of life, including the right to earn a living and make money, determine this in the light of all the evidence, including that of the physicians, insofar as you may be able to credit their testimony.

I cannot assist you very much, gentlemen, on the general question of the weight to be given to the testimony or the credibility of the witnesses. You may not find the duty which you have to discharge in a case of this kind a difficult one, or you may find

it to be easy. These witnesses, that is, some of them, have testified directly contrary one to the other. All of them could not be telling the truth. It is for you to say whether any one of them has wilfully perverted the truth. So far as is possible, it is the duty of jurors to reconcile the testimony where there are discrepancies, but where it is impossible to do so of course you will have to reject the testimony of one witness or another. Generally speaking, you should apply the rules that you have learned in the practical experience of life, having in mind the motives by which men are actuated, the incentives to speak the truth or to color it or pervert it, the interest, direct or indirect, which any witness may have, his intelligence or want of intelligence, etc. You have seen the witnesses testify, and you are quite as able as I am to determine who has told the truth and what weight to give to the testimony.

Two forms of verdict have been prepared. One is simply, "We the jury in the above entitled cause find for the defendant." That you will use in case you find in favor of the defendant. The other is that you find in favor of the plaintiff, and you assess his damages against the defendant in the sum of blank dollars. A blank is left in which you will insert the amount which you award the plaintiff, if you find in his favor at all. In either case, if you agree upon a verdict, your foreman will sign it, and you will come into court.

Different from the practice in the state court, it is necessary that all of you concur in finding a ver-

dict. Some of you may have been upon juries in the state court, and in civil cases there nine of you agreeing may return a verdict. In this court it is necessary that you all agree before you can return a verdict.

Perhaps I should make one other suggestion. If you find in favor of the plaintiff, and also find some difficulty in agreeing upon the amount which should be awarded, it would be improper for you to resort to what is called lot or chance. Juries sometimes in such a predicament, in order to reach an agreement, adopt the plan of each one writing the amount which he thinks should be awarded on a piece of paper, and then adding all twelve amounts together and dividing by twelve, and take that as the verdict. That would be an improper thing to do. The verdict is supposed to be the result of your judgment, and not the result of a resort to chance in that way. Try to agree upon a verdict, gentlemen. Use your best endeavor so to do. Listen to fair discussion, and see whether you cannot bring your minds to agree upon one result. Let the bailiff be sworn.

MR. FOX: It is my understanding that the practice requires that the exceptions taken to the instructions should be taken before the jury retires, Your Honor.

THE COURT: Yes. The jury may retire to the hallway, and I will call them back if I decide to modify the instructions.

(The bailiff was thereupon sworn.)

THE COURT: You will observe this oath, gentlemen. Retire now with the bailiff.

(The jury thereupon retired from the court room.)

MR. FOX: The defendant now objects and excepts to that portion of the instructions of the court to the jury to the effect that it is one of the duties of the defendant in this case to furnish the plaintiff a reasonably safe place in which to work, for the reason that the duty of providing a reasonably safe place in which to work does not extend to places or structures made dangerous by the very work in which the workman is engaged, so far as that safety depends upon the due performance of the work by the workman and those who stand in the relation to him of fellow servants.

2. The defendant objects and excepts to that portion of the instructions of the court to the jury which advises the jury that the testimony of the plaintiff is corroborated by the testimony of the witness Simih, for the reason that in no particular is such testimony corroborative.

3. The defendant objects and excepts to that portion of the instructions of the court to the jury which advises the jury in words and effect that it was necessary that the plaintiff in this case should have been warned of the danger by the shift boss or have it brought to his attention, otherwise the defendant would be liable. I don't quite remember the language of Your Honor, but I think you laid stress upon the fact that the plaintiff should be warned in this case.

THE COURT: I didn't intend so to instruct.

MR. FOX: It is quite difficult to keep in mind the entire instruction.

THE COURT: I think you may bring the jury back. I doubt whether the jury would put the construction upon the instructions which you seem to suggest here, but in order to avoid any question and to guard against it in any way, on the first two points—I am quite sure that on the last point I gave no such impression.

MR. FOX: Would Your Honor care to have a statement of the law in reference to that question?

THE COURT: No.

(The jury was thereupon returned into court.)

THE COURT: Gentlemen, my attention is directed to two particulars in which it is thought you may misunderstand what I intended to say to you.

First. I did not intend to express the opinion that the plaintiff is necessarily corroborated by the witness Thomas Simih. I meant to suggest that you might find,—might or might not find that he is corroborated by him. It is for you to say what the facts are, and you may disregard any view that you may think I entertain, or that you may think that I have expressed in the course of these instructions, as to the facts, or as to the issues of fact. I merely intended to direct your attention to that in order to make clear the issue. It is for you to say whether Simih does or does not corroborate the plaintiff's testimony.

In the second place, it may be that you did not fully understand what I meant to say to you about the duty of the master, the defendant in this case, to use reasonable care to see that the place where the plaintiff was working was kept in a safe condition. I did

say, and intended to say, that that is a primary duty of all employers of labor. In this case, however, under the conditions, it was entirely proper for the defendant to discharge that duty to one like the plaintiff by employing him as a skilled miner, as a miner of experience, and impose upon him the duty of making inspection of the place where he was about to go to work, and to bar down any loose rock. He, upon his own testimony, assumed that duty in this case. He admits that that was his duty, and hence the defendant company was not in the first place responsible for the discharge of that duty to him. It was his duty to bar down this rock and his duty to make inspection and see whether the place was safe. And if the foreman did not, while he, the plaintiff, was making such inspection, come along and direct him to stop his inspection, and to go to work with his drill, then, as I have already tried to make plain to you, he couldn't recover, and, as I have tried to make plain to you, it comes to be merely a question of fact as to whether or not the plaintiff is telling the truth about what Brown said to him, or whether Brown is telling the truth in his testimony as to what occurred there when the two were together. That is all. You may retire now with the bailiff.

(The jury thereupon retired to consider their verdict.)

The jury returned into court at eleven-thirty P. M., Thursday, Nov. 23, 1916, with the following verdict:

*"In the District Court of the United States for the
District of Idaho, Northern Division.*

LOUIS ANDERSON, *Plaintiff,*

vs.

FEDERAL MINING & SMELTING COMPANY,
a Corporation, Defendant.

VERDICT.

No. 655.

We, the jury in the above entitled cause, find for the plaintiff and assess his damages against the defendant in the sum of \$7,500.

J. J. HURM, Foreman."

Filed Nov. 23, 1916.

W. D. McReynolds, Clerk.

9:30 A. M., Friday, Nov. 24, 1916.

MR. FOX: If Your Honor please, in the case we tried yesterday I would like to have sixty days stay of execution. I desire to file a motion or petition for new trial.

THE COURT: Very well. I suppose there is no objection, Mr. McFarland?

MR. McFARLAND: I think not, Your Honor.

THE COURT: Sixty days stay of execution.

MR. FOX: If Your Honor please, I neglected to ask Your Honor to include in that order an opportunity for us to file a bill of exceptions in thirty days, instead of ten days, as provided by the rule.

THE COURT: Very well. Thirty days for the defendant in which to prepare and serve proposed bill of exceptions. You are aware, of course, that a

bill of exceptions is not necessary on your motion for new trial?

MR. FOX: I understand that, Your Honor.

And comes now the defendant, Federal Mining & Smelting Company, and serves, presents and files the foregoing as and for a full, true and correct Bill of Exceptions of all rulings made at and during the course of the trial of the above entitled action in the above entitled Court, which said rulings were duly objected and excepted to by the defendant, upon the grounds mentioned therein, said exceptions being accompanied with the whole evidence in said case, the same being necessary to explain the said exception, and each and every of them, and their, and each of their, relation to the case, and to show that the said rulings, and each and every of them, tended to prejudice the rights of the said defendant.

Dated at Wallace, Idaho, this 22nd day of December, A. D. 1916.

FEATHERSTONE & FOX,
Attorneys for Defendant,
Wallace, Idaho.

Service of the foregoing Bill of Exceptions accepted and the receipt of a true and correct copy thereof admitted at Coeur d'Alene, Idaho, this 23rd day of December, A. D. 1916.

Lodged Dec. 23, 1916.

McFARLAND & McFARLAND,
Attorneys for Plaintiff,
Coeur d'Alene, Idaho.

Duly allowed and settled as the defendant's Bill of Exceptions, this 17th day of February, 1917.

FRANK S. DIETRICH,

Judge.

Filed Feb. 17, 1917.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 655.

PETITION FOR NEW TRIAL

To the Honorable Frank S. Dietrich, Judge of the District Court of the United States for the District of Idaho, Northern Division, the petition of the Defendant Federal Mining & Smelting Company, respectfully represents:

The defendant Federal Mining & Smelting Company respectfully petitions the above entitled Court and Judge thereof to set aside the verdict rendered by the jury in the said cause in the sum of seventy-five hundred dollars (\$7500.00) on the 23rd day of November, 1916, and the judgment entered thereon, which judgment was entered on the 24th day of November, 1916, and to grant this defendant a new trial in said cause for the following reasons and upon the following grounds, to-wit:

1. Because of errors occurring at the trial.
2. Because of the insufficiency of the evidence to justify the verdict.
3. Because the verdict and the judgment thereon is against the law.

4. Because of surprise which ordinary prudence could not have guarded against.

5. Because of irregularity in the proceedings of the adverse party by which the defendant was prevented from having a fair trial.

6. Because excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

As to the errors in law occurring at the trial, the defendant specifies the following particulars which it relies upon, to-wit:

(a) The Court erred in denying the defendant's motion for a non-suit made at the close of all of the testimony given on behalf of the plaintiff.

(b) The Court erred in denying the defendant's motion to direct a verdict for the defendant which motion was made at the close of all of the evidence.

As to the point of the insufficiency of the evidence to justify any verdict in favor of the plaintiff, the defendant specified the particulars thereon as follows:

(a) The evidence wholly fails to disclose any negligence on the part of the defendant, but does disclose that it was the duty of the plaintiff to make the place in which he was working secure against danger by barring down or otherwise securing the place by means well known to the plaintiff as an experienced miner, and the evidence conclusively shows that any injuries which the plaintiff may have sustained were the result of the fall of rock from the roof or back of the stope at the place in which

he was working and into which he was drilling, and was one of the obvious risks which he assumed upon entering the employment of the defendant.

(b) The evidence of the plaintiff to the effect that he was assured of the safety of the ground under which he was working and directed to work is irrelevant, incompetent and immaterial in this case for the reason that such evidence is not within the issues, there being no allegation in the pleadings that the plaintiff was injured by reason of his having been assured that the ground was safe and had been directed to work there without making an inspection which he was ordinarily required to do.

(c) Even if it is conceded that the testimony of the plaintiff is true that he was assured by the shift boss that the ground under which he was working was safe and was directed by him to work there, then the evidence conclusively discloses that the plaintiff and the said shift boss were fellow servants; the evidence conclusively disclosing that the shift boss was not engaged in the performance of a non-delegable duty of the master in giving such assurance and direction.

Moreover, the evidence of the alleged assurance of safety and direction of the shift boss to the plaintiff is insufficient to warrant the conclusion that the plaintiff actually received such assurance and direction at all. And it is entirely insufficient to warrant a conclusion that the plaintiff relied thereon, or had reason for doing so. But the evidence conclusively discloses that, as

an experienced miner, of more than 16 years' experience, and especially in view of his intimate knowledge of the duties of a machineman in that mine, the plaintiff knew that he had no right to rely upon such assurance or follow such direction, if the same were actually given, for the following reasons:

1st: Because plaintiff knew that the shift boss had not seen the place where the plaintiff was working on that day;

2nd: Because plaintiff had more time and greater opportunity than the shift boss to ascertain the nature of the ground;

3rd: Plaintiff knew that under the rules and customs of that mine it was his own duty to inspect the ground under which he was working and to ascertain for himself, for the purpose of protecting himself, whether or not the place was safe, and, for the purpose of making the same safe, to bar down or otherwise secure the place; and the plaintiff knew that it was no part of the duty of the shift boss to make such detailed or particular inspection, nor was it the duty of the shift boss to bar down, or secure the place where the plaintiff was working against the very danger from which the plaintiff sustained an accident and injuries, and

4th: The evidence not only fails to show that the shift boss had authority to interfere with rules and customs of the mine by making such assurance and giving such order, but it conclusively shows that the shift boss had no such right and authority, and that this was well known and understood by the plaintiff.

Moreover, it conclusively appears from the evidence that despite such assurance and direction, if the same were actually given, it was the duty of the plaintiff to inspect the place for himself and to make the same secure against danger, and that, therefore, if he failed to do so because of such alleged assurance and direction, he assumed the additional risk of working under rock and ore, which he knew, or in the exercise of reasonable care might or could have known, were dangerous and liable to fall.

Upon the point of the misconduct of the plaintiff by which the defendant was prevented from having a fair trial, we assign the misconduct of counsel in his argument to the jury. The same was practically entirely an appeal to the passion and prejudice of the jury against the defendant. By way of illustration we call the Court's attention to the statement of counsel in his closing argument to the jury in which he said in substance and to the effect, that the defendant would have been glad if more rock had fallen upon the plaintiff and had killed him, so that they would not have had to pay any damages because nobody would have heard anything more about it. In this connection we also call Your Honor's attention to the constant reference made by counsel for the plaintiff to the defendant in this case as "this corporation."

Upon the assignment of surprise which ordinary prudence could not have guarded against, the defendant specifies as follows:

The allegations of the amended complaint as to

negligence are that the plaintiff "Did not know and had no means of knowing and by the exercise of due care, caution and diligence could not have discovered the dangerous and unsafe condition of the place in, at and where he was performing his said duty, and did not know and had no means of knowing, and by the exercise of due care, caution and diligence could not have discovered that the said rock and ledge matter then and there being above and over him in the said mine where he was performing his said duty were loose, insecure or otherwise dangerous and unsafe,—and that prior to commencing his duty in the operation of said compressed air drill, he examined and inspected the place in which he was performing his said duties and examined the overhanging rock and ledge matter with as much care and caution as he was able to exercise,—he did not discover and could not by the exercise of reasonable care, caution and diligence have discovered that the said rock and ledge matter were loosened or insecure and liable to fall upon him; that under the terms of plaintiff's employment it was not his duty to test the condition of said overhanging rock and ledge matter, but that it was the duty of the defendant to carefully examine and test the condition of said overhanging rock and ledge matter before plaintiff commenced the performance of his duties in the operation of said drill or driller, which defendant negligently omitted to do; that the plaintiff, prior to receiving said injuries and prior to the time he commenced the performance of his said duties, as afore-

said, had a right to believe and did believe that the defendant carefully tested the condition of the overhanging rock and ledge matter, and that the same was in a safe condition; that the defendant at or prior to the time plaintiff received said injuries could by the exercise or ordinary care, caution and diligence have discovered said unsafe and dangerous condition of said rock and ledge matter where he was performing his said duties, but negligently and carelessly failed to do so and carelessly and negligently permitted the plaintiff to continue his said duties with apprising or warning him of said danger."

Upon the trial of the case the plaintiff not only abandoned every ground of negligence alleged in the complaint, but admitted, time and again, it was not true as alleged in his complaint that it was the duty of the defendant to make the place in which plaintiff was working safe, but that under the customs and rules of the mine it was his duty to do so, and excused his failure to do so by an alleged assurance of safety and direction by the shift boss to drill without making the place secure. In the very nature of the case it was impossible for the defendant, taken by surprise as it was by this entire change in the theory of the case and in the grounds of negligence, to adequately prepare or present the defendant's case. It was impossible with intelligence and foresight to closely examine the plaintiff and to present the defendant's side of the case.

As to the point that the verdict is excessive, it manifestly appears that the same was rendered through passion and prejudice of the jury against the defendant; the jury were out only a short time and apparently split the difference and gave the plaintiff one-half of the amount claimed. The testimony conclusively shows that the plaintiff did not suffer any permanent physical injuries, no bones were broken and no nerves injured, the only apparent symptom being pain, which is a subjective of symptom, and which can easily be claimed or exaggerated without any real physical reason or foundation therefor. The verdict and judgment in this case should in no event have exceeded the sum of \$500.00 and is excessive by the sum of seven thousand dollars (\$7000.00).

This petition is made upon the pleadings and papers on file, the minutes of the court and the evidence and all the proceedings in the case.

Wherefore your petitioner, Federal Mining & Smelting Company, prays that your Honorable Court will set aside the verdict of the jury and judgment thereon and will grant to petitioner a new trial in said cause.

Dated at Wallace, Idaho, this 21st day of December, 1916.

FEATHERSTONE & FOX,
BRANCH BIRD,

Attorneys of Defendant.

Residence and P. O. Address, Wallace, Idaho.
Service of within petition admitted and receipt of

a true and correct copy thereof admitted, at Wallace, Idaho, this 21st day of December, A. D. 1916.

McFARLAND & McFARLAND,

Attorneys for Plaintiff.

Wallace, Idaho.

Filed Dec. 26th, 1916.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

DECISION ON PETITION FOR NEW TRIAL

April 25, 1917.

McFarland & McFarland, *Attorneys for Plaintiff.*

Featherstone & Fox, *Attorneys for Defendant.*

DIETRICH, *District Judge:*

It must be conceded that while the case approaches, it does not fall within, the exceptional rule that where the character of the work is such that the condition of the place, in respect to safety, necessarily changes and is constantly shifting as the work progresses, the master is relieved from his primary obligation to keep the place safe. The reason for this exception is that it would generally be impracticable, and sometimes impossible, for him in such a case to provide a safe place. In tearing down a structure, for example, or in blasting down coal in a coal mine, or barring down rock in a mine such as the one herein involved, conditions change from moment to moment, and it is wholly beyond the power of the master to make inspection or to provide for the safety of employes; the latter must look out for themselves.

But in the instant case such was not the condition at the time of the accident. The plaintiff was not "making his own place"; he was drilling holes into, not shattering, the solid rock, or loosening that which had been shattered. He might have worked indefinitely without substantially weakening the back of the stope or affecting the safety of the place where he was at work. If the place was dangerous when he went on duty, it was so as a consequence of the blasting which had taken place before. The blasting had been completed before his shift commenced, and the evidence abundantly shows that it was entirely practicable by inspection to determine whether or not the stope was safe, and, if not, in what particular it was unsafe, and furthermore it was practicable to put it into safe condition before the plaintiff entered upon the work of drilling. The defendant's printed rules, offered in evidence, recognize the practicability of safeguarding against accidents of this character, and the testimony on both sides supports this view. Indeed I do not understand that the defendant now contends otherwise. *Bunker Hill and Sullivan M. Co. v. Jones*, 130 Fed. 813. We start out, therefore, with the premise that primarily it was the positive, non-delegable duty of the defendant to make an inspection of the stope after the blasting was completed and before the work of drilling for additional blasts was resumed. Such inspection was not a detail of operation, but related to the duty of providing a safe place to work. To meet this view, the defendant invokes another well recognized exception to

the general rule, namely, that the master is relieved from responsibility for dangerous conditions where the injured employe, here the plaintiff, is, by express custom or contract, charged with the duty of making the place safe. In support of this branch of its defense, it introduced certain standing rules, by which employes are enjoined to take sufficient time to make the required examinations for the purpose of guarding against accidents, and to see that the place where they are employed is safe. It is very much to be doubted whether the plaintiff ever read these rules or heard them read or explained, but perhaps that consideration is unimportant in view of the conceded fact that he recognized it to be a general custom and rule in mining operations of this character for the experienced miner, such as he admits he was, when going on shift, to make proper inspection, and, if necessary, to bar down loose or shattered rock from the back of the stope. In short, he recognized that it was his duty to look out for his own safety in this respect. In response to this contention on the part of the defendant, which he concedes to be well founded both in fact and in law, the plaintiff claims that, recognizing his duty in this respect, he was engaged in making inspection as best he could, although the appliances reasonably necessary for that purpose were not at hand, and would have been able to detect the perilous condition of the slab which later fell upon him, and would have avoided the danger, had the foreman or shift boss not assured him that the place was safe, and ordered him to go to work with

his drill. There is a sharp conflict in the testimony upon this issue, he asserting and the foreman denying that such a conversation took place. The foreman testified that he himself called the plaintiff's attention to what he regarded as a dangerous condition, but that the plaintiff assured him that it was all right, and that in any event he, the plaintiff, was standing in such a position that if the slab fell it would not hurt him. The instructions were very specific upon this issue, and the verdict necessarily implies that the jury believed the testimony of the plaintiff and discredited that of the foreman. It was preeminently an issue for the jury, and their finding must be accepted as conclusive of the fact. It therefore remains to consider whether or not as a matter of law the defendant can be held responsible for the consequences of the imprudent and negligent conduct of its foreman or shift boss in directing the plaintiff to forego inspection with the assurance that the place was safe, and in ordering him to go on with his work. As I understand, it is conceded by the defendant that if the foreman, in respect to this direction to the plaintiff, was acting for and in the place of the defendant, was in effect a vice-principal, then the defendant could properly be held responsible (*Ohio Copper Co. v. Hutchins*, 172 Fed. 201), but it vigorously protests that the shift boss, though occupying a position of superiority to the plaintiff, is in law to be deemed merely his fellow servant, and that therefore the case is one where the plaintiff, in accepting employment, assumed all risk of danger from his negligence.

The record is not very specific touching duties of the foreman, but it is fair to infer that upon his shift he had complete charge of the mining operations upon the sixteenth and eighteenth levels of the mine, comprising twenty-two floors. At the particular time he had supervision of the work of from thirty-five to forty men, who were engaged here and there upon the several floors, and ordinarily he was able to visit each place where the work was going on twice during the shift. It is further to be inferred that he himself did no manual labor, but that his entire service was that of directing and superintending the work of others. Under these circumstances it is not entirely free from doubt that in respect to mining operations, strictly speaking, he was a fellow servant with the plaintiff. *Carnegie Steel Co. v. Yuhasz*, 224 Fed. 438. *Alaska M. Co. v. Muset*, 114 Fed. 66. But that question it is unnecessary to decide. We are here concerned with his status in relation to the positive duty of the defendant to use reasonable care to maintain the stope in a reasonably safe condition, for his imprudent instructions to the plaintiff pertained not to the manner of mining but to the matter of making the stope safe. The distinction is clearly drawn in *Kelly v. Mining Co.*, 41 Pac. 273, cited with approval in *Bunker Hill and Sullivan M. Co. v. Jones*, 130 Fed. 819.

In disposing of this particular question, I was at the trial, and upon more mature reflection I still am, inclined to attach much significance to one of the defendant's standing rules, which it offered in evi-

dence, namely, where it is provided that "each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and if necessary the foreman or shift boss must be notified." Doubtless the condition existing at the time of the accident was one falling within the class covered by this rule. Under the rule, it was the duty of the plaintiff himself to make examination to see whether the stope was safe before he commenced work. But it further seems to be equally plain that it was the intention of the defendant to constitute the foreman or shift boss its representative in respect to matters of safety, with power to determine what to do, and with authority to direct and control the miners in respect to such matters. Suppose that the plaintiff in this case had taken the time, and had been successful in discovering the defective condition of the stope, and, concluding that the defect was of such character that he could not remedy it, he desired to appeal to the master to make the place secure, where would he have gone? How could he have communicated with the defendant? Is it not manifest that this rule directed him to go to the foreman or shift boss? Did not the rule impliedly say to him that in respect to matters of safety he was to recognize the foreman as being the principal? Otherwise why notify the shift boss? There is no further provision that the shift boss should thereupon report to any

other officer of agent. The fact that here the shift boss came to the plaintiff instead of the plaintiff reporting to him, does not alter the case. If within this sphere the foreman was a vice-principal, his instructions were the instructions of the defendant, and necessarily imposed responsibility. Can there be any doubt of the consequences had the plaintiff declined to go on with his work when the foreman directed him to desist from further inspection, with the assurance that the place was safe? While the record does not expressly disclose the power of the foreman to discharge, such authority is to be inferred from the general nature and dignity of the position he occupied and indeed in the argument it is conceded. Not that this consideration is controlling, but it may be resorted to for light upon the question whether or not the parties understood that the plaintiff assumed the risk of the foreman's negligence in respect to conditions of safety. The doctrine contended for is so harsh that I am not inclined to give it place except upon the clearest authority. It seems to me that it would enable employers, by adopting the system here employed, practically in all cases to withdraw from the employe all substantial protection which the general rule of the master's positive, non-delegable duty was designed to afford. Nor when we come to examine the decided cases upon the subject do we find such clear authority. The defendant has furnished a very elaborate and able brief upon the question, with numerous citations. It is not strange that in none of them were the facts precisely the same.

Personal injuries happen under the greatest variety of circumstances, and personal injury claims often turn upon very slight distinguishing features. It is to be presumed that, out of the great multitude of cases, counsel have cited those deemed to be the most favorable to their contention. But upon examination it is found that most of them relate not to the maintenance of a safe place in which to work, but to the mere details of carrying on the work. We may briefly notice a few of them. In *City of Minneapolis v. Lundin*, (C. C. A., 8th Circuit), 58 Fed. 525, the work of blasting was being carried on continuously. Obviously it was wholly impracticable for the defendant city to keep safe the place where the plaintiff was at work. Assuming that his injury was the result of the negligence of the foreman of his gang, the court discussed the legal principles applicable, and in the course of the discussion it was said that: "Whether or not the master is liable for the negligence of such a servant (a foreman) in a given case must be determined by the nature of the duty in the performance of which he was guilty of negligence. If he was engaged in discharging an absolute duty of the master the latter is liable, otherwise it is not." But here, as already shown, the action of the shift boss related to an absolute duty of the master, the duty to inspect the stope for the purpose of seeing whether or not it was safe. In *Alaska Mining Co. v. Wheelan*, 168 U. S. 86, very frequently cited, the gist of the case is stated in one sentence of the syllabus, namely: "And the corporation is not liable to one

of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men." Very clearly there was not involved in the case any question of a safe place to work or of suitable and safe machinery and appliances. As the court said: "There was no evidence that he (the foreman) was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men," for its use. In *Martin v. Atchison, etc. R. R. Co.*, 166 U. S. 399, the foreman of a section gang, while traveling on a hand car, directed one of his men not to look out for approaching trains, and he, the foreman, carelessly failed to keep a lookout, but clearly this negligence related only to a detail of the work. In *Larson v. McClure*, 70 N. W. 662, the court said: "The present case does not seem to fall within the rule that the master must furnish the servant a reasonably safe place in which to work, inasmuch as the plaintiff and his fellow servants practically created the place and its attendant perils from hour to hour in the prosecution of their labors; and the condition was constantly shifting by reason of their own acts, of which, as well as the probable consequences, they must be held to have had notice." These cases are typical of the great majority of the decisions cited by counsel, and manifestly are not conclusive, even if we regard the shift boss as a fellow servant with the plaintiff, insofar as concerns his primary duty of mining, as distinguished from his

authority in the matter of maintaining safe conditions. In *Florence & C. C. R. Co. v. Whipps*, 138 Fed. 13, another case cited, the court lays great emphasis upon the fact that an emergency existed, and that careful inspection by the railroad company was impracticable. It was also held that plaintiff knew and was able to appreciate the perils, and assumed the risk. Still another case upon which the defendant relies, *Kelly v. Jutte & Foley Co.*, 104 Fed. 955, is not so easily distinguished, but with all due respect to the learning of the court, the reasoning of the decision does not impress me as being highly persuasive. Moreover, it seems to me to be out of harmony with the principles recognized in *Metropolitan Redwood Co. v. Davis*, (9th C. C. A.), 205 Fed. 487.

Further in support of its contention, the defendant has cited *Davis v. Trade Dollar M. Co.*, 117 Fed. 122, *Bunker Hill etc. v. Schnelling*, 79 Fed. 263, and *The Westport*, 136 Fed. 391,—all decisions from the Circuit Court of Appeals of this circuit. While possibly tending to support the proposition that in matters of operation the shift boss and the plaintiff were fellow servants, the Schnelling and Westport cases have little, if any, direct bearing upon the precise question under consideration, which pertains not to matters of operation, but to the safety of the conditions under which the operatives were required to work. The facts in the Davis case are more nearly analogous, but it is readily distinguishable. Davis, a miner, was injured by the explosion of a missed shot. As his shift came on duty he and his associates were

informed by the foreman of the preceding shift that there were two missed shots, one in the back and one in the bottom of the tunnel. It turned out that one of these shots was in the breast rather than the bottom of the tunnel, but the court found that Davis knew that the preceding foreman had made no investigation, and he, the plaintiff, instead of making a careful investigation, assumed that one of the missed shots was under a pile of debris. It was held that he himself was negligent. The court says: "The rules of ordinary prudence required the plaintiff in error to require some member of his shift, before beginning to drill, to make an examination in the face of the tunnel, and discover the location of the unexploded blasts, and the evidence shows that the plaintiff in error himself made the examination. The foreman of the retiring shift did not pretend to say that he had made such examination. * * * The plaintiff in error, while making his examination, did not take the trouble to remove the debris at the bottom of the tunnel, which debris he erroneously supposed concealed an unexploded hole."

In conclusion upon this point, I think it must be held that primarily it was the positive duty of the defendant, by reasonable inspection, to maintain the stope in which the plaintiff was working in a reasonably safe condition; that such inspection would reasonably have been made subsequent to the explosion of the blasts fired by the preceding crew, and the method employed by the defendant in carrying on its mining operations contemplated such inspection; that it was proper for the defendant to impose upon the

members of the succeeding shift the duty of making such inspection and of barring down all loose rock before they commenced the work of drilling, and such was the duty of the plaintiff in this case; that, as the jury found, while plaintiff was so engaged in making the place safe for work, and before he had completed his investigation, he was directed by the foreman to desist from further inspection and to go to drilling, with the assurance that the place was safe; that the defendant had constituted the foreman its representative in respect to matters of safety, with authority to receive reports from subordinate employes and to act and give directions upon its behalf and in its stead; that, therefore, in effect, when the foreman directed the plaintiff to desist from further inspection and to go to work with his drill, the defendant relieved the plaintiff from the duty imposed by its general rules, of making the place safe, and itself resumed the full obligation and responsibility of a master in that respect.

It is further earnestly insisted that a new trial should be granted because, owing to the general nature of the averments of the amended complaint, the defendant could not anticipate the claim that the foreman had given this direction to the plaintiff, and that therefore, to its great prejudice, it was taken by surprise at the trial. It must be conceded that in the light of the evidence the complaint is not free from criticism and is somewhat misleading; it should have more particularly advised the defendant of the precise claim which would be made. I am not satisfied that counsel for the plaintiff wilfully drew the

complaint in such a manner as to withhold information touching this claim. The plaintiff is a foreigner, and it was very difficult to understand him when he was upon the witness stand, and it is entirely possible that the precise nature of what occurred was not known to his counsel until he testified. I do not think that there is a variance between the allegations and proofs, for the negligence alleged and relied upon by the plaintiff is the failure of the defendant to provide a safe place in which the plaintiff was required to work. It is true that in the course of the trial it appeared from one aspect of the testimony that the defendant had relieved itself of this obligation, and that the plaintiff himself had assumed it, but, as I have held, from another aspect of the testimony it appears that by reason of the directions of the foreman to the plaintiff, he, the plaintiff, was temporarily relieved from such obligation, and that the defendant thus resumed full responsibility in the premises, and that the accident occurred as a result of its failure to discharge its obligation thus temporarily resumed, so that after all the charge in the complaint that the defendant failed to provide a safe place to work is sustained by the proof. As I have already stated, the complaint is subject to criticism in being inaccurate and in not being sufficiently definite, but the defendant made no claim at the trial that it would suffer any serious prejudice if the trial was permitted to proceed, and even now, though arguing that it was taken by surprise, and that it could present a much better record upon another trial, no showing has been

made of the respects in which additional testimony could be adduced. Apparently all persons who had any knowledge of what occurred were present and testified, and no showing is now offered touching any additional specific evidence. I do not think that under the circumstances I would be justified in granting a new trial upon this ground alone.

Finally it is contended that the verdict is excessive, and I am inclined to concur in this view. Such was the very strong impression I had at the time it was returned, and I have not been able to escape the conviction that it ought to be set aside, if it is not diminished. The rules under which such action is taken, and the conditions justifying it, are well understood, and need not be discussed. I have therefore concluded to direct that unless the plaintiff is willing to remit \$2500.00 of the verdict, and let it stand for \$5000.00, a new trial will be granted. A written statement remitting the \$2500.00 should be filed with the clerk within ten days from the date hereof; otherwise an order will be entered granting a new trial.

Filed April 26, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

STIPULATION

In conformity to the decision of the Honorable Frank S. Dietrich, Judge of the above entitled court rendered on, to-wit: the 26th day of April, A. D. 1917, wherein it was ordered that a new trial be granted in this action unless the plaintiff within ten

days from the said 26th day of April, A. D. 1917, file with the clerk, and serve upon the defendant, a stipulation consenting to remit Twenty-five Hundred Dollars (\$2500) and accept Five Thousand Dollars (\$5000) with interest and costs in full satisfaction of the judgment in said action, the undersigned, Louis Anderson, plaintiff in the above entitled action, and R. E. McFarland and W. B. McFarland, co-partners doing business under the firm name of McFarland & McFarland, attorneys for the plaintiff in said action, hereby jointly and severally stipulate, agree and consent to remit the sum of Twenty-five Hundred Dollars (\$2500) of the said judgment, and to accept the sum of Five Thousand Dollars (\$5000) with interest and costs in full satisfaction of said judgment.

Dated this 27th day of April, 1917.

LOUIS ANDERSON,

Plaintiff.

McFARLAND & McFARLAND,

By R. E. McFARLAND,

Attorneys for Plaintiff.

W. B. McFARLAND,

Member of Firm.

State of Idaho,

County of Shoshone,—ss.

On this 27th day of April, in the year 1917, personally appeared before me, L. E. Worstell, a notary public in and for Shoshone County, State of Idaho, Louis Anderson and R. E. McFarland, personally known to me to be the persons who executed the fore-

going instrument, and they and each of them acknowledged to me that they executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in Wallace, Idaho, the day and year in this certificate first above written.

L. E. WORSTELL,

Notary Public in and for the State of Idaho,

(Seal.)

Residing at Wallace, Idaho.

My commission expires on the 19th day of June, 1919.

United States of America,

State of Idaho,

County of Kootenai,—ss.

R. E. McFarland, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff named in the above entitled action; that Featherstone & Fox are the attorneys of record for the defendant in said action, and reside and have their office at Wallace, Shoshone County, State of Idaho; That affiant served the above and foregoing stipulation upon the above named defendant, Federal Mining and Smelting Company, a corporation, on the 28th day of April, A. D. 1917, by depositing in the United States Post Office at Coeur d'Alene, Idaho, an envelope addressed to said Featherstone & Fox, at Wallace, Idaho, containing a true and correct copy of said stipulation, and prepaying the postage thereon.

That at said time there was and yet is a United States Post Office in said city of Wallace, Idaho, and in said city of Coeur d'Alene, Idaho, and that be-

tween said two places there was and yet is daily communication by mail.

R. E. McFARLAND,

Subscribed and sworn to before me this 28th day of April, A. D. 1917.

W. D. McREYNOLDS,

(Seal.)

Clerk of U. S. District Court.

By L. M. LARSON,

Deputy Clerk.

Filed April 28, 1917, at 1:30 o'clock, P. M.

W. D. McReynolds, Clerk.

By Lawrence M. Larson, Deputy.

(Title of Court and Cause.)

PETITION FOR WRIT OF ERROR

Comes now Federal Mining & Smelting Company, a corporation, defendant herein, and says that on or about the 24th day of November, A. D. 1916, this Court entered judgment herein in favor of the plaintiff and against the defendant in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenti-

cated may be sent to the said Circuit Court of Appeals.

FEATHERSTONE & FOX,
Attorneys for Defendant.

Residence and postoffice address: Wallace, Idaho.
Filed May 3, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)
ASSIGNMENTS OF ERROR

I.

The Court erred in overruling the defendant's demurrer to plaintiff's amended complaint.

II.

The Court erred in denying defendant's motion for non-suit made at the close of plaintiff's evidence in the case because the evidence adduced by the plaintiff was insufficient in the following particulars:

(a) The evidence did not show any negligence on the part of the defendant which was the proximate cause of the injuries sustained by the plaintiff.

(b) If the plaintiff in this case sustained the injuries complained of, the evidence shows he sustained them by reason of his own negligence and carelessness and his contributory negligence and carelessness.

(c) If the plaintiff was injured as alleged, the evidence shows he was injured by reason and through the risk of his employment, to-wit, the falling of rocks which was an obvious risk of his employment,

and which was assumed by the plaintiff upon his entering said employment.

(d) If the plaintiff was injured as alleged, the evidence shows that he was injured by reason of the negligent act of a fellow servant, to-wit, the shift boss in giving a wrongful and negligent direction and assurance in reference to a detail of the work.

Which motion was denied by the Court, to which ruling of the Court the defendant by counsel then and there duly excepted, which exception was allowed by the Court and which ruling of the Court the defendant now assigns as error.

III.

The Court erred in refusing to instruct and direct the jury to bring a verdict for the defendant for the following reasons, to-wit:

1. That the plaintiff has wholly failed to show any negligent act or omission on the part of the defendant which was the proximate or any cause of the accident or injury complained of in plaintiff's complaint.

2. That if the plaintiff was injured while in the employ of the defendant, as alleged in his complaint, he was injured by and through the negligence and carelessness of a fellow servant.

3. If the plaintiff was injured as complained of in his complaint, he was injured by and through his own negligence and carelessness, and his own contributory negligence and carelessness.

4. If he was injured as alleged in his complaint, he was injured by and through a risk of his employ-

ment which was plain and obvious to the plaintiff, and which risk was assumed by the plaintiff.

5. It is not alleged in the complaint, and the defendant was not advised, that the plaintiff would claim in this case that he was injured by and through an erroneous and careless and negligent direction of the shift boss.

To which ruling of the Court the defendant then and there by counsel duly excepted, which exception was allowed by the Court, and which ruling of the Court the defendant now assigns as error.

SPECIFICATIONS WHEREIN THE EVIDENCE
IS INSUFFICIENT TO SUSTAIN THE VER-
DICT OF THE JURY AND JUDGMENT
THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injuries to the plaintiff. The evidence is insufficient to show that the direction and assurance alleged to have been given the plaintiff by the shift boss was actually given by the shift boss to the plaintiff, and the evidence is insufficient to show that the language alleged to have been used by the shift boss was an order to the plaintiff to cease inspection and to stop barring down and a direction to proceed to work and an assurance of safety to either or any of them.

(b) The evidence conclusively shows that the proximate cause of plaintiff's injuries was the negligence of a fellow servant, to-wit, the shift boss. In this respect the evidence not only does not show that the shift boss was authorized by the defendant either by the written rules and regulations adopted and promulgated by the defendant or by the customs existing in defendant's mine to give such alleged assurance and direction under the then circumstances, but conclusively shows that the shift boss was not empowered or authorized by the defendant to give such alleged assurance and direction, and conclusively shows that the alleged assurance and direction of the said shift boss to the plaintiff was a violation of the duty which the said shift boss owed not only to the plaintiff but to the defendant as well, the violation of which duty on the part of the said shift boss could not have been foreseen or guarded against by the defendant, and which could not consequently be charged as negligence of the defendant.

The evidence further conclusively shows that the alleged assurance and direction of the shift boss, if the same actually were given, were a direction and assurance given by the shift boss to the plaintiff in reference to an executive detail of the work over which the plaintiff had exclusive control under the rules and regulations and customs of the defendant's mine. The evidence further conclusively shows that the shift boss was not a superintendent or head of a department but simply in charge of a number of men in defendant's mine and that the men of whom

the said shift boss was in charge, including the plaintiff, were with the shift boss engaged in the common object and employment and work of mining ore, and the plaintiff and the other miners on his shift were therefore fellow servants of the said shift boss.

(c) The evidence conclusively shows that despite the alleged assurance of safety and direction to proceed to work, the danger to which the plaintiff was exposed was so obvious that he assumed the risk thereof, it conclusively appearing from the evidence that the plaintiff was a miner of some sixteen years' experience, had worked in the employ of the defendant as a miner for more than a year and in the particular stope in which he was injured for more than a month, and in the particular place in which he was injured for more than three days; that under the rules, regulations and customs of the defendant's mine it was the duty of the plaintiff to examine and test the ground in or under which he was about to set to work to drill before commencing such drilling operations, and to bar down or remove any loose or dangerous rocks before commencing such drilling operations; and the evidence further conclusively shows that the plaintiff not only was perfectly competent and able to perform such duty but that he had the means and instrumentalities with which to do it and could, but for the said alleged assurance and direction of the shift boss have rendered the place in which he was working safe. The evidence further conclusively shows that the plaintiff had the greater and better opportunity than the shift boss

to determine whether or not the ground was reasonably safe and whether or not the same should be barred down or otherwise removed; and further conclusively shows that under the then existing condition under the rules, regulations and customs of the said mine he had no right to rely upon the alleged assurance of safety and direction to proceed to work.

(d) The evidence conclusively shows that the negligence of the plaintiff contributed to his own injuries in this that he set to work under ground which he knew it was his duty to inspect and examine without having made the necessary examination to determine whether the ground was safe or not to work under and without having adequately secured the same by barring down or other methods known to miners, he having had the opportunity and the ability to make such inspection and to adequately guard against the very danger which caused his injury.

(e) The evidence conclusively shows that the alleged assurance and direction of the shift boss, if given, were contradictory of and given in violation of the written rules and regulations adopted by the defendant.

(f) The verdict and judgment are excessive and not warranted by the evidence, it conclusively appearing from the testimony that the plaintiff is not incapacitated from the performance of manual or other labor, or incapacitated at all.

Comes now the defendant Federal Mining & Smelting Company in this action in connection with its petition for a writ of error, and makes, proposes

and files the foregoing assignments of error which it avers occurred upon the trial of said cause, together with its specifications where in the evidence is insufficient to sustain the verdict and judgment thereon, and prays that because thereof the judgment of the District Court may be reversed.

FEATHERSTONE & FOX,
Attorneys for Defendant.

Postoffice address, Wallace, Idaho.

Filed May 3, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

BOND ON WRIT OF ERROR

Know All Men by These Presents, That we, Federal Mining & Smelting Company, a corporation, as principal, and The Aetna Accident and Liability Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, having complied with all of the statutes of the United States authorizing it to become a surety on bonds in the courts of the United States, as surety, are held and firmly bound unto the defendant in error, Louis Anderson, in the full and just sum of eleven thousand dollars (\$11,000.00) to be paid to the said defendant in error, Louis Anderson, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents;

Sealed with our seals and dated this 1st day of May, A. D. 1917.

Whereas, lately at a session of the District Court of the United States for the District of Idaho, Northern Division, in a suit pending in this court between Louis Anderson as plaintiff and Federal Mining & Smelting Company, a corporation, as defendant, a judgment was rendered against the said Federal Mining & Smelting Company, upon the verdict of a jury in the sum of seven thousand five hundred dollars (\$7,500.00) and costs amounting to the further sum of sixty-five dollars and twenty cents (\$65.20); and,

Whereas, thereafter upon petition for a new trial presented by defendant to the said District Court of the United States for the District of Idaho, Northern Division, the said court made an order granting the said motion and setting aside the verdict of the jury and the said judgment thereon unless within ten days after making and filing of said order the plaintiff remit the sum of two thousand five hundred dollars (\$2,500.00) and interest thereon from the said judgment; and

Whereas, pursuant to the said order and in conformity therewith, the plaintiff did in writing within said time remit the said sum of two thousand five hundred dollars and interest of the said judgment and thereupon judgment was entered in said action in favor of the said plaintiff and against the said defendant for the sum of five thousand dollars (\$5,000.00) and costs amounting to the said sum of sixty-five dollars and twenty cents (\$65.20); and

Whereas, the said defendant Federal Mining &

Smelting Company, considering it is aggrieved thereby, has obtained from the said court a writ of error to reverse and correct said judgment in that behalf, and a citation directed to the said plaintiff, Louis Anderson, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco in the State of California.

Now, the condition of the above obligation is such that if the Federal Mining & Smelting Company shall prosecute the said writ of error to effect and answer all damages and costs if it fails to make the said plea good in said court, then the above obligation to be void, otherwise to remain in full force and virtue.

This bond is intended as bonds for costs upon appeal and is a supersedeas bond.

FEDERAL MINING & SMELTING COMPANY,

By Frederick Burbidge, Its General Manager and Agent, *Principal.*

THE AETNA ACCIDENT AND LIABILITY COMPANY,

By Herman J. Rossi, Resident Vice-President.

(Seal.)

Attest: R. Myers, Resident Assistant Secretary.

State of Idaho,

County of Shoshone,—ss.

On this 1st day of May, in the year 1917, before me, a Notary Public, personally appeared Herman J. Rossi and R. Myers, known to me to be the Resi-

dent Vice-President and Resident Assistant Secretary, respectively, of The Aetna Accident and Liability Company, the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same; that they know the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was affixed by order of the Board of Directors of said Company; that they signed their names thereto by like order; that the said company has been duly licensed by the Insurance Commissioner of the State of Idaho to transact a surety business in the State of Idaho and is authorized by the laws of the State of Idaho to become sole surety upon bonds.

R. S. CLOUGH,

(Seal.)

Notary Public.

My commission expires Sept. 20, 1919.

The foregoing bond is hereby approved this 3rd day of May, A. D. 1917, and the same when filed shall operate both as a bond for costs on appeal and as a supersedeas bond.

Dated this 3rd day of May, A. D. 1917.

FRANK S. DIETRICH,

District Judge.

Filed May 3, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ORDER ALLOWING WRIT OF ERROR

This 3rd day of May, A. D. 1917, came the defendant Federal Mining & Smelting Company by

its attorneys and filed herein and presented to the Court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration hereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of eleven thousand dollars (\$11,000.00) which shall operate as a supersedeas bond.

Dated this 3rd day of May, A. D. 1917.

FRANK S. DIETRICH,

*Judge of the United States District Court
for the District of Idaho.*

Filed May 3, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT

*To W. D. McReynolds, Clerk of the United States
District Court, Boise, Idaho:*

You will please prepare a transcript in the above entitled cause and include therein:

1. Bond on writ of error, Petition for writ of error, Assignments of error, Order allowing writ

of error, Order to transmit original exhibits, Bond on writ of error, Praecipe for transcript, writ of error, Citation on writ of error and writ thereof, and all other papers relating to the writ of error.

2. Judgment roll.
3. Bill of exceptions.
4. Copy of all journal entries.
5. Everything else in the record.

FEATHERSTONE & FOX,
Attorneys for Defendant.

Filed May 3, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

ORDER TO TRANSMIT ORIGINAL EXHIBITS

It appearing that a writ of error has been prayed for and allowed from the United States Circuit Court of appeals to the above entitled Court in this cause and good cause appearing therefore,

It Is Hereby Ordered that all of the original exhibits in the above entitled cause be transmitted to the Clerk of the Circuit Court of Appeals for the Ninth Circuit. Said exhibits consist of the printed mining rules and regulations of the defendant Federal Mining & Smelting Company.

Dated this 3rd day of May, A. D. 1917.

FRANK S. DIETRICH,
District Judge.

Filed May 3, 1917.

W. D. McReynolds, Clerk.

WRIT OF ERROR

*The United States Circuit Court of Appeals for the
Ninth Circuit.*

The United States of America,
Ninth Judicial Circuit,—ss.

*The President of the United States, to the Honorable
Judge of the District Court of the United States,
for the District of Idaho, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court before you, or some of you, between Louis Anderson, plaintiff, and Federal Mining & Smelting Company, a corporation, defendant, a manifest error hath happened to the great damage of the said Federal Mining & Smelting Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you will send the record and proceedings aforesaid with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit on the 3rd Day of June next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what

of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 3rd day of May, A. D. 1917, and in the one hundred forty-first year of the Independence of the United States of America.

Allowed by FRANK S. DIETRICH,
United States District Judge.

Attest: W. D. McReynolds, Clerk of the United States District Court, for the District of Idaho.
Filed May 3, 1917.

W. D. McReynolds, Clerk.

CITATION ON WRIT OF ERROR

*In the United States Circuit Court of Appeals for
the Ninth Circuit*

The United States of America,
Ninth Judicial District,—ss.

To Louis Anderson, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, California, in said Circuit on the 3rd day of June next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Idaho, Northern Division, wherein Federal Mining & Smelting Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not

be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Frank S. Dietrich, District Judge of the United States at Boise, Idaho, within said Circuit, this 3rd day of May, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America the one hundred and forty-first.

FRANK S. DIETRICH,
United State District Judge.

I hereby this 5th day of May, A. D. 1917, accept personal service of this citation on behalf of Louis Anderson, defendant in error.

W. B. McFARLAND,
Attorney for Defendant in Error.

Filed May 5, 1917.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

RETURN TO WRIT OF ERROR

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,

(Seal.)

Clerk.

(Title of Court and Cause.)

No. 655.

CLERK'S CERTIFICATE

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 230, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript of the record herein upon Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$280.00, and that the same has been paid by the plaintiff in error.

Witness my hand and the seal of said court this 19th day of May, 1917.

W. D. McREYNOLDS,

(Seal.)

Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

FEDERAL MINING & SMELTING
COMPANY, a Corporation,

Plaintiff in Error,

vs.

LOUIS ANDERSON,

Defendant in Error.

Brief of Plaintiff in Error

UPON WRIT OF ERROR FROM THE UNITED
STATES DISTRICT COURT FOR THE
DISTRICT OF IDAHO, NOR-
THERN DIVISION

Filed

SEP 22 1917

FEATHERSTONE & FOX,

Wallace, Idaho,

Attorneys for Plaintiff in Error.

F. D. Monckton,
Clerk.

McFARLAND & McFARLAND,

Wallace, Idaho,

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit

FEDERAL MINING & SMELTING
COMPANY, a Corporation,

Plaintiff in Error,

vs.

LOUIS ANDERSON,

Defendant in Error.

STATEMENT OF THE CASE.

This is an action instituted by Louis Anderson, the plaintiff below and defendant in error here, against the Federal Mining & Smelting Company, a corporation, the defendant below and the plaintiff in error here, to recover damages for personal injuries alleged to have been sustained by the plaintiff, due to the alleged negligence of the defendant in the particulars hereinafter stated, while in the latter's employ in what is commonly known as the Morning mine, situated near the town of Mullan, in Shoshone County, Idaho. The respective parties will for convenience be referred to respectively as plaintiff and defendant. The plaintiff is an experienced miner, and at the time of the accident had been engaged in mining for eighteen or nineteen years, and had been employed in the capacity of a ma-

chine man for more than fifteen years. He had been working in the Morning mine for about a year in the capacity of a machine man, and in the stope in which he was engaged for two or three months, and in the particular place in which he was engaged for six or seven days. (Tr. pp. 41-42; 57-58). At the time of the accident he was drilling into the rock which fell. At the trial it was conceded to be the duty of the machine man to inspect the place in which he was about to work, and accordingly it was the duty of the plaintiff in the particular instance to have inspected the particular place in which he was about to set to work and the conditions of the particular rock which fell. This duty devolved upon the plaintiff, not only by virtue of the general custom and method of mining prevailing in the mine of the defendant, and other mines in the district, but also by virtue of two rules adopted by the defendant, said rules being Nos. 2 and 3 and are as follows:

“2. It is the duty of all employes to take sufficient time to make the examinations required by these rules, to guard against any dangers from accidents in mine or its workings.

“3. Each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and, if necessary, the Foreman or Shift-Boss must be notified.”

Plaintiff testified again and again that it was his duty to inspect the place in which he was working, that he was perfectly competent to make such inspection, and that he ordinarily did make such inspection, and that had he made such inspection he could have discovered that the place in which he was working, and the particular rock which fell, was not safe, and that it was his duty then, to remove all dangers and he could have removed such dangers before setting to work, but excused his failure to make the inspection on this day, and to bar down the rock which fell, by reason of the fact that the shift boss, one Brown, came along and told him that the place was all right, and that the plaintiff should set to work to drill. The testimony of the plaintiff in this particular is found on pages 46 and 47 of the transcript, and is as follows:

“Q. What did your shift boss tell you?

“A. The shift boss asked me if I ain't doing nothing here. I says yes, I was barring down the loose, and I couldn't find no bar, and I looked for a bar but couldn't find them; I had the pick and tools I had there, and I take it as I come.

“Q. What else did he tell you?

“A. He said never mind that, that is all right, and start to work and get them holes drilled, and get the holes ready to blast tonight.

“Q. Did he say anything to you about whether he had tested it himself?

"A. No. He said he found out that the place was all right.

"Q. He said he had found out that the place was all right?

"A. Yes."

And then the plaintiff testified that he started in to drill. The shift boss denied that he had had this conversation with the plaintiff, but said that he stated to him that the place did not appear to be all right and that the plaintiff should bar down before setting to work to drill. (Tr. pp. 127-128). The only question of alleged negligence, charged as being the proximate cause of the accident, which was submitted by the trial court to the jury, was as to whether or not the said alleged assurance of safety and direction to proceed to work was given by the shift boss Brown to the plaintiff. The court's direction upon this point is found upon pages 186 and 187 of the transcript, and is as follows:

"In the second place, it may be that you did not fully understand what I meant to say to you about the duty of the master, the defendant in this case, to use reasonable care to see that the place where the plaintiff was working was kept in a safe condition. I did say, and intended to say, that that is a primary duty of all employers of labor. In this case, however, under the conditions, it was entirely proper for the defendant to discharge that duty to one like the plaintiff by employing him as a skilled miner, as a miner of experience, and im-

pose upon him the duty of making inspection of the place where he was about to go to work, and to bar down any loose rock. He, upon his own testimony, assumed that duty in this case. He admits that that was his duty, and hence the defendant company was not in the first place responsible for the discharge of that duty to him. It was his duty to bar down this rock and his duty to make inspection and see whether the place was safe. And if the foreman did not, while he, the plaintiff, was making such inspection, come along and direct him to stop his inspection, and to go to work with his drill, then, as I have already tried to make plain to you, he couldn't recover, and, *as I have tried to make plain to you, it comes to be merely a question of fact as to whether or not the plaintiff is telling the truth about what Brown said to him, or whether Brown is telling the truth in his testimony as to what occurred there when the two were together.* That is all. You may retire now with the bailiff."

Assuming then that the said assurance and direction were given the plaintiff by the shift boss Brown, the principal question which is presented for review upon this writ of error is as to whether or not, in the giving of such assurance and direction, the shift boss Brown was a fellow servant of the plaintiff, or a vice-principal of the defendant, and if the shift boss was a fellow servant of plaintiff, then manifestly the judgment below can not be sustained.

The jury rendered a verdict of \$7500 in favor of the plaintiff, and on motion for a new trial, a remittitur was granted of \$2500 which was accepted by the plaintiff and a judgment entered for \$5000.

It is to be observed that the only issue of alleged negligence submitted by the court to the jury, namely, the alleged negligent assurance of safety and direction to proceed to work given by the shift boss Brown, was not raised by the pleadings, the complaint and the amended complaint in the action alleging that the negligence of the defendant consisted in permitting the place, where the plaintiff was injured, particularly the back into which the plaintiff was drilling, to become and remain in a dangerous and unsafe condition.

In paragraph 7 of the amended complaint, it is alleged that the plaintiff did not know, and had no means of knowing, and by the exercise of due care, could not have discovered the dangerous and unsafe condition of the place in which he was performing his duty; that he was not provided with the means of testing the over-hanging rock; that he did not discover the same, and in the exercise of reasonable care, could not have discovered the same; that it was not his duty to test the condition of the over-hanging rock, nor to examine the same, but it was the duty of the defendant to do so, and that the defendant omitted to do so, and that it was the latter's duty to inspect the ground for the purpose of ascertaining whether there was any danger from over-hanging rock, and that it was not the plaintiff's duty to make such tests, and that the defendant

negligently failed to make the same. This Court will observe that there is not a line either in the complaint or the amended complaint to the effect that the defendant negligently or otherwise gave any assurance of safety of the place, or gave the plaintiff direction, upon such assurance, to set to work and drill underneath the rock which fell. The theory upon which the complaint and the amended complaint were drawn was entirely abandoned by the plaintiff upon the trial, and as stated, the only ground upon which this cause was sent to the jury was that the master had, through a supposed vice-principal, the shift boss, assured plaintiff that the place was safe, and directed him to proceed to work and drill under and into the rock which fell and caused the injuries to the defendant in error.

Contrary to the allegations of the amended complaint, the plaintiff both on direct examination and on cross examination, repeatedly admitted that it was the duty of the miner to inspect the place in which he is about to set to work for the purpose of determining whether there was any loose or overhanging or dangerous rock, and that the tools for such purposes were provided by the master, although it is claimed that the plaintiff could not find a bar. However, the trial court ruled, as we understand it, that the plaintiff assumed the risk of the failure to furnish such a bar, if indeed it is a fact that such failure existed.

The fact that it was the duty under the customs and rules of the mine of the plaintiff to inspect and bar down and make reasonably safe the place in which he

was working, became so obvious that the trial court ruled a number of times sustaining objections to the admission of such testimony, and stated that the necessity for proof of this fact was obviated by the repeated admissions of the plaintiff. (Tr. pp. 79-80)

On cross examination, on page 59 of the transcript, plaintiff testified:

“Q. And you did know the duties of a machine man underground, did you?

“A. I knowed it, yes.

“Q. You know the duties of a machine man under the customs in that mine, the first thing he must do is to bar down?

“A. Yes.

“Q. And when you went on shift that day you knew the first thing you must do was to make your place safe by barring down, isn't that correct?

“A. That's right.”

And on further cross examination on pages 63 and 64 of the transcript, he admitted that if there was loose ground or rock and it should be barred down, then it was the duty of the machine man to get the timbermen to put a sprag under the ground to hold it, and also admitted that there were plenty of sprags there; that sometimes powder was used by the machinemen to blast out rocks which could not be barred down or spragged, and that plenty of powder was available for

the men for that purpose. In fact it is one of the miner's duties to test the ground and bar down, or other wise secure the same, before setting up to drill underneath it. And his contract of employment contemplates that he must do these things and have adequate experience and skill to take care of his place of work under any given conditions.

There is absolutely no evidence from which the jury could have found as a matter of fact, or the court could have found as a matter of law, that the shift boss was the vice-principal of the master or had any right or authority to advise the plaintiff, contrary to the obvious fact, that the place was safe, or to direct him to work beneath a rock which was dangerous; but there is abundant evidence, as we have seen, that it was the miner's duty to make the inspection and to bar down rock which was by such inspection found to be unsafe. The evidence further discloses that the shift boss had quite a number of men under him working in different parts of the stopes. Mr. Brown, the shift boss, testified that he had from 35 to 40 men under him, and that he had the 1600 and 1800 levels to look after, each of which is 200 feet deep; and there are 22 floors between the 1600 and 1800 levels, and also 22 floors between the 1400 and 1600 levels; (Tr. pp. 123-124) that he did not get to the place where plaintiff was working for an hour and three-quarters after they went on shift. (Tr. p. 125) In the meantime he was going through the other floors; that his men were scattered over both levels; that he made the rounds of the shift only two or three times a day. In other words the evidence

conclusively shows that the plaintiff went to work at the place where he was injured immediately upon going on shift; that the shift boss did not go around there until an hour and three-quarters after that time, and that the shift boss had not been at that place before the plaintiff went to work, and that he knew of this fact.

It further conclusively appears from the evidence that the miners generally, who are continuously working in a given place barring down or drilling, have the better opportunity of ascertaining the character of the place than does the shift boss, and this is particularly true as to the opportunity which the plaintiff had of knowing that the place under which he was working was in a dangerous condition.

SPECIFICATIONS OF ERROR.

I.

The Court erred in refusing to instruct and direct the jury to bring a verdict for the defendant for the following reasons, to wit:

1. That the plaintiff has wholly failed to show any negligent act or omission on the part of the defendant which was the proximate or any cause of the accident or injury complained of in plaintiff's complaint.

2. That if the plaintiff was injured while in the employ of the defendant, as alleged in his complaint, he was injured by and through the negligence and carelessness of a fellow servant.

3. If the plaintiff was injured as complained of in his complaint, he was injured by and through his own negligence and carelessness, and his own contributory negligence and carelessness.

4. If he was injured as alleged in his complaint, he was injured by and through a risk of his employment which was plain and obvious to the plaintiff, and which risk was assumed by the plaintiff.

5. It is not alleged in the amended complaint, and the defendant was not advised, that the plaintiff would claim in this case that he was injured by and through an erroneous and careless and negligent direction of the shift boss.

SPECIFICATIONS WHEREIN THE EVIDENCE
IS INSUFFICIENT TO SUSTAIN THE VER-
DICT OF THE JURY AND THE JUDG-
MENT THEREON.

The evidence is insufficient to sustain the verdict of the jury and the judgment thereon in the following particulars, and for the following reasons, to-wit:

(a) There is no evidence of any negligence on the part of the defendant which was the proximate cause of the injuries to the plaintiff. The evidence is insufficient to show that the direction and assurance alleged to have been given the plaintiff by the shift boss was actually given by the shift boss to the plaintiff, and the evidence is insufficient to show that the language al-

leged to have been used by the shift boss was an order to the plaintiff to cease inspection and to stop barring down and a direction to proceed to work and an assurance of safety to either or any of them.

(b) The evidence conclusively shows that the proximate cause of plaintiff's injuries was the negligence of a fellow servant, to-wit, the shift boss. In this respect the evidence not only does not show that the shift boss was authorized by the defendant either by the written rules and regulations adopted and promulgated by the defendant or by the customs existing in defendant's mine to give such alleged assurance and direction under the then circumstances, but conclusively shows that the shift boss was not empowered by the defendant to give such alleged assurance and direction, and conclusively shows that the alleged assurance and direction of the said shift boss to the plaintiff was a violation of the duty which the said shift boss owed not only to the plaintiff but to the defendant as well, the violation of which duty on the part of the said shift boss could not have been foreseen or guarded against by the defendant, and which could not consequently be charged as negligence of the defendant.

The evidence further conclusively shows that the alleged assurance and direction of the shift boss, if the same actually were given, were a direction and assurance given by the shift boss to the plaintiff in reference to an executive detail of the work over which the plaintiff had exclusive control under the rules and regula-

tions and customs of the defendant's mine. The evidence further conclusively shows that the shift boss was not a superintendent or head of a department but simply in charge of a number of men in defendant's mine and that the men of whom the said shift boss was in charge, including the plaintiff, were with the shift boss engaged in the common object and employment and work of mining ore, and the plaintiff and the other miners on this shift were therefore fellow servants of the said shift boss.

(c) The evidence conclusively shows that despite the alleged assurance of safety and direction to proceed to work, the danger to which the plaintiff was exposed was so obvious that he assumed the risk thereof, it conclusively appearing from the evidence that the plaintiff was a miner of some sixteen years' experience, had worked in the employ of the defendant as a miner for more than a year and in the particular stope in which he was injured for more than a month, and in the particular place in which he was injured for more than three days; that under the rules, regulations and customs of the defendant's mine it was the duty of the plaintiff to examine and test the ground in or under which he was about to set to work to drill before commencing such drilling operations, and to bar down or remove any loose or dangerous rocks before commencing such drilling operations; and the evidence further conclusively shows that the plaintiff not only was perfectly competent and able to perform such duty but that he had the means and instrumentalities with which to do it and could, but for the said alleged as-

assurance and direction of the shift boss, have rendered the place in which he was working safe. The evidence further conclusively shows that the plaintiff had the greater and better opportunity than the shift boss to determine whether or not the ground was reasonably safe and whether or not the same should be barred down or otherwise removed; and further conclusively shows that under the then existing condition under the rules, regulations and customs of the said mine he had no right to rely upon the alleged assurance of safety and direction to proceed to work.

(d) The evidence conclusively shows that the negligence of the plaintiff contributed to his own injuries in this that he set to work under ground which he knew it was his duty to inspect and examine without having made the necessary examination to determine whether the ground was safe or not to work under and without having adequately secured the same by barring down or other methods known to miners, he having had the opportunity and the ability to make such inspection and to adequately guard against the very danger which caused his injury.

(e) The evidence conclusively shows that the alleged assurance and direction of the shift boss, if given, were contradictory of and given in violation of the written rules and regulations adopted by the defendant.

ARGUMENT.

The assignments of error and the specifications wherein the evidence is insufficient to sustain the ver-

dict and judgment thereon may be grouped under two heads, and we will therefore discuss the propositions of law involved thereunder as follows:

PROPOSITION 1. The evidence fails to disclose any negligence on the part of the defendant which was the proximate cause of the accident and resulted in injuries to the plaintiff because the alleged assurance and direction given by the shift boss to the plaintiff were not given by or under the authority of the defendant, but by a fellow servant of the plaintiff for whose negligence in these respects the defendant was not responsible, and the risk of whose negligence plaintiff assumed.

PROPOSITION II. The alleged order and assurance of the shift boss were contradictory of the rules adopted by defendant, and were given in violation thereof.

PROPOSITION I.

The evidence fails to disclose any negligence on the part of the defendant which was the proximate cause of the accident and resulted in injuries to the plaintiff because the alleged assurance and direction given by the shift boss to the plaintiff were not given by or under the authority of the defendant, but by a fellow servant of the plaintiff for whose negligence in these respects the defendant was not responsible, and the risk of whose negligence plaintiff assumed.

A thorough investigation of the authorities discloses that, before a servant will be relieved of his assump-

tion of risk by a negligent assurance of safety coupled with a direction to proceed to work, a certain state of facts must be shown. From a careful study of the decisions it conclusively appears that the master is liable for the giving of such assurance and instruction by a superior servant only in the following cases:

First, where the master owes the servant a positive duty to make the place where he is directed to work reasonably safe, and the assurance of safety and direction to proceed to work are coupled with a failure to give the servant a reasonably safe place in which to work. This line of authorities proceeds upon the theory that the master, upon whom is imposed the duty of making a particular place reasonably safe, has the greater opportunity for observing the condition of such place. Even in such cases it is held that, if it appears from the evidence that the employe has the greater opportunity, or even an equal opportunity with the master, to determine the nature and character of the place where he is set to work, then an assurance and direction of the master does not relieve the servant of the assumption of risk.

It may be well to dispose right here of this class of cases as being inapplicable to the case at bar. Manifestly none of these conditions are found in the case at bar. In the first place the plaintiff assumed under the rules and customs of the mines the duty of inspecting the place in which he was working for dangers incident to falling rock, and assumed the duty of removing such dangers by barring the same down, or

otherwise guarding against them. (Tr. pp. 59, 61, 62, 63, 64, 79, 80) Moreover, it appears from the evidence that the plaintiff not only had *equal* opportunity with the master to observe the place, but he had the *greater* opportunity to do so. Plaintiff had been working in that place about a week (Tr. p. 78), and on that particular morning an hour and three-quarters before the shift boss came around (Tr. p. 125). Conceding for the moment, but for the purpose of this statement only, that the shift boss was a vice principal of the master, it appears from the evidence that the plaintiff set to work in this place immediately upon going on shift. He had been directed to work there several days before and did not even need a direction on that day to set to work there. (Tr. p. 78). The shift boss who had from thirty-five to forty men under him scattered through two levels in the mine, the 1600 and 1800 levels, was able to get around to his men only twice, or at most three times, each day. (Tr. p. 126.) He actually did not get to the place where the plaintiff was working until an hour and three-quarters after the plaintiff had set to work. (Tr. p. 125.) The evidence conclusively shows that the shift boss had not been around prior to that time, and conclusively shows that outside of the casual visual examination made by him at the time he saw the plaintiff at work for the first on time that day, he had not had an opportunity to examine the place in which the plaintiff was working, nor is it contended that at that time he made any other than such casual visual examination of the place, nor that he made any other examination whatsoever at

any other time. The evidence further conclusively shows that in order to make a minerlike and thorough examination, as was required under the then existing circumstances, it became necessary to examine the ground by means either of a crowbar or the drilling machine itself; and it conclusively appears that the shift boss could not, and did not, make such examination, and, further, that it was not the duty of the shift boss, under the then existing circumstances, to do so, but the duty of the plaintiff himself. (Tr. pp. 59, 61, 62, 63, 64, 79, 80).

The next class of cases where the master is bound by the giving of a negligent assurance and direction to a servant is that class of cases where the master is assuring and directing an *inexperienced* servant. This is obviously likewise not the case here for the plaintiff was an experienced miner, of some sixteen years experience, (Tr. p. 4) had worked in the capacity of a miner for the defendant for more than a year, (Tr. pp. 42, 57) and in the particular stope in which he was working for a matter of more than three or four months, (Tr. p. 57) and in the particular place in which he was working for about a week. (Tr. p. 78.) He held himself out as an experienced miner—hired himself out as such—and testified that he thoroughly understood the duties of miners (Tr. p. 58) and knew that it was their duty to test the ground and bar the same down before setting to work, and that he was familiar with all of the details of the methods which an experienced miner uses in making the place

in which he is working safe for himself. (Tr. pp. 45, 59, 61, 63, 64.)

In both of the foregoing classes of cases it must further appear, as a condition precedent to creating liability upon the master by an assurance of safety and a direction to proceed to work, that the employe was justified in relying, and did rely, upon such assurance.

The evidence in this case not only fails to show circumstances which warranted the plaintiff in relying upon the alleged assurance, but conclusively, as we think, shows that the plaintiff was not justified in relying upon the alleged assurance, inasmuch as he knew it was not the duty of the shift boss, but the duty of the plaintiff himself, to make such careful examination, and that he knew that he had the greater opportunity to make the same and that the shift boss had not made the same and had not had an opportunity to make an adequate inspection.

In this class of cases it is always conceded by the defendant that a wrongful assurance of safety is the negligence of the master, and the defense interposed is that, despite the assurance of safety and direction to work, the danger was so obvious that the servant assumed the risk, and sometimes the defense is interposed that the servant by his own negligence contributed to the negligent assurance and direction of the master. Of course in such cases the courts have justly submitted the question of assumption of risk and contributory negligence to juries, and have held that, before the servant will be held to have assumed the risk,

the same must appear to have been so obvious that a prudent man would not have incurred the risk despite the assurance, and have usually held that the question of contributory negligence is not a matter of law for the court.

But in *all* cases, in order to render the master liable, it must be shown that the particular person giving such assurance and order was in that respect a vice-principal of the master, and not a fellow servant.

The evidence in the case at bar absolutely fails to show that the master had authorized the shift boss to give such assurance and direction, but conclusively shows the contrary. Not only do the rules provide that it was the duty of the plaintiff to make such inspection and a determination as to the safety of the ground, and if the ground was determined by the plaintiff not to be safe, then to take the proper steps to remedy it, but the customs of the miners and the methods of the work required that the plaintiff do this, and not the shift boss.

We realize that the trial court took the view that the shift boss was a vice principal, inasmuch as the rules provided that, if the miners found that they could not make their place safe themselves, then the shift boss must be called; and his Honor inferred from this rule that, inasmuch as in certain instances the defendant may have been said to have left the ultimate determination of whether the place had been rendered safe to the shift boss, it had constituted the shift boss its vice principal in the matter of such supervision,

and was, therefore, bound by the assurance and direction alleged to have been given in this case. However, the rule was manifestly not intended to give, nor did it actually give any additional or greater powers to the shift bosses in the defendant's mine than they had without this rule, or than any other shift boss or foreman of a gang in any other occupation has in reference to directing the men. All superior servants, particularly bosses and foremen—have not only the right to direct their men in reference to the executive details of the work, but have the power to discharge for failure to obey such instruction in respect to such details. We believe we will conclusively show such power of the shift boss does not take him out of the fellow servant class. The great weight of state authorities, and the unanimous holdings of the federal courts, are to the effect that the shift bosses and foremen in the matter of giving instructions to the men working under them are fellow servants of the men, and that negligence in giving such instruction, even if coupled with an assurance of safety, express or implied, is the negligence of a fellow servant and not the negligence of the master. Moreover the facts, contemplated by the master to exist before the shift boss is expected to assume special direction of the men in assisting them in making their places safe, are not disclosed by the testimony in this case. The rule provides in substance that, if the miners themselves feel that they are unable, without the assistance of the shift boss, to carry out the duty devolving upon them of making the place safe, then they may, or must, request the assistance of the shift boss.

In this case the evidence conclusively shows that the plaintiff considered himself sufficiently competent to render the particular place safe, and further conclusively shows that he did not need or desire the assistance of the shift boss in this work. The matter of rendering this place safe was comparatively simple for an experienced miner. The interference of the shift boss was, to say the least, officious, and was made under circumstances which the master could not have contemplated and did not contemplate, either in the promulgation of the rule, or in investing the shift boss with the power of direction of the men. The best that can be said of the action of the shift boss was that the same was a breach of duty and a violation of the particular rule in question on his part, which could in no wise have been foreseen or guarded against by the master. Such breach of duty was not the breach of duty of the defendant but was the breach of duty of the shift boss, not only toward the plaintiff in this case, but toward the defendant as well, and for such breach the defendant cannot be held responsible nor mulcted in damages.

Turning for a moment to the question of the dangers of falling rock as being an incident of mining, the risk of which is assumed by the servant. There can be no question that the danger of falling rock, where it is the duty of the employe to inspect and remove that danger, is an incident and risk in mining which the miner assumes. When the plaintiff set to work there he knew that, unless a proper inspection was made by him by testing the ground as the miner understands such work must be done, he would become exposed to dan-

gers of falling rock; and that is a danger the risk of which is assumed. The danger of rock falling from ground which has not been properly examined is so obvious that any miner of the plaintiff's experience, who undertakes to work under such ground, must conclusively be presumed to have assumed the risk.

As has already been seen, this was the view which his Honor took of the law at the trial of this case.

If, therefore, the assurance and direction of the shift boss was not the assurance and direction of the master, that is, if the master did not authorize the same, but if such assurance and direction was the assurance and direction of a fellow servant, the plaintiff cannot recover.

The main question in this case then is: Were the plaintiff and the shift boss fellow servants?

The rule in the federal courts as to who are fellow servants is so well settled that no citation of authority should be needed to illustrate the general principle, and it is this: That all persons, irrespective of grade, who are in the common employment of a master, and who are effecting a common object in such employment, are fellow servants; and that the question of whether or not a particular servant is a vice principal of the master does not depend upon the grade of the offending servant, that is, whether one is superior to the other or has authority over the other, but depends upon the character of work in which the particular servant is engaged, that is to say; if the servant is performing a

duty which the law imposes upon a master, such as furnishing the servant with a reasonably safe place in which to work, or furnishing adequate appliances with which to work, or giving inexperienced servants instructions in regard to the work, or performing any other duty which the law imposes upon the master, then such offending servant, irrespective of rank or grade, stands in the shoes of the master and is a vice principal, because the law does not permit the master to delegate such duty without making the person delegated to perform the same his vice principal. The leading case upon this proposition, of course, is the case of *B. & O. Rd. Co. v. Baugh*, 13 Sup. Rep. 914; 149 U. S. 368; 37 L. ed. 772.

We think that it cannot be contended in this case that the shift boss was the vice principal of the master in giving this assurance and direction; that is, that he was performing a personal duty imposed upon the master by law, which was delegated to the shift boss. In this contention we think we are substantiated by the great weight of the state authorities and by all of the federal authorities.

In the case of *City of Minneapolis v. Lundin*, 58 Federal 525, the plaintiff was a blaster over whom one Holdquist was foreman. Holdquist had been informed that one of the blasts had not exploded. The plaintiff did not know that there was any unexploded dynamite. Holdquist, with the knowledge that there remained an unexploded blast, directed the plaintiff to reload the holes without telling him that the dynamite remaining

had not been exploded, and it was the negligence of Holdquist in giving such direction, without notifying the plaintiff of the fact that there remained unexploded dynamite which was known to the shift boss Holdquist, that the injury occurred. In this case, therefore, there was a direction, coupled with an implied assurance of safety, in the face of positive knowledge of the gravest danger. The Circuit Court of Appeals of the Eighth Circuit, in rendering its opinion (p. 527), say:

“In our opinion, the two authorities first cited, *supra*, are decisive of the question here at issue. In the first case it was held that an engineer who, under the rules of a railroad company, was ‘regarded as conductor,’ and who had the direction and control of his engine and of his fireman upon it, was not a vice-principal of the company, and that the latter was not liable for an injury to the fireman, caused by the engineer’s negligent disregard of his orders. In the second case this court held that the fact that the foreman of a crew of 10 men had authority to direct them where to work and what to do, and was intrusted with the duty of propping the roof of a room in a mine, and keeping it safe for these workmen who were engaged with him in mining coal, did not make him a general vice-principal where his crew was one of several working under the general direction of a pit boss and a general superintendent, but that the liability of the company for his negligence must be determined by the nature of the duty he was performing when he caused the injury.”

And again in considering whether or not, under the then circumstances, the foreman Holdquist was a special vice principal the Court of Appeals say at page 529:

“It was the duty of the master to use reasonable care and diligence to furnish a safe place for the defendant in error to perform his service in, and it is claimed that it was a breach of this duty for the foreman to send him to reload these holes without notifying him that there was dynamite in one of them. But the duty of the master to furnish a safe place for the performance of work does not require it to keep that place safe under the constantly changing conditions which the performance of such a working as the construction of a sewer necessitates. The city furnished a street in which it was safe to construct a sewer. The comparative safety of the place where each man worked necessarily constantly varied by the progress of the work, and the duty of the master did not extend to keeping every place where each workman labored safe at every moment of its progress. It was the duty of each workman to use reasonable care to so render his service that the place in which he and his fellow servants were required to labor should continue to be reasonably safe. It was the duty of the foreman to so direct the work of excavating, of laying the pipe, and of filling the trench that it would continue to be reasonably safe for every man in his crew to render the service assigned to him. But these were personal duties imposed upon the workmen and the

foreman by their employment in the common service, and not by the delegation to them of the performance of any absolute duty of the master. The street originally furnished by the city was safe. The trench in which the rock was to be blasted was originally safe for the blasting of rock. If the safe place originally furnished by the city became unsafe in the progress of the work, it was rendered so not by any negligence of the city or its superintendent in furnishing it, but by the acts or negligence of the foreman and his workmen in discharging the duties imposed upon them by their common employment, and for these acts and this negligence the city was not responsible. Each employe assumed the risk of this negligence of his fellow servants when he entered the common employment. *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. Rep. 433; *Bunt v. Mining Co.*, 138 U. S. 483, 11 Sup. Ct. Rep. 464; *Killea v. Faxon*, 125 Mass. 485.

“The result is that the foreman was not the vice-principal of the city, but was the fellow servant of the defendant in error in the performance of the only act of negligence disclosed by the record, and the circuit court should have instructed the jury to return a verdict in favor of the city. *Railway Co. v. Davis*, 3 C. C. A. 429, 53 Fed. Rep. 61; *Gowen v. Harley*, 56 Fed. Rep. 973, 980; *Monroe v. Insurance Co.*, 3 C. C. A. 280, 52 Fed. Rep. 777; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727, 733, 8 Sup. Ct. Rep. 266;

Railway Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. Rep. 569; Railway Co. v. Cox, 145 U. S. 593, 606, 12 Sup. Ct. Rep. 905; Meehan v. Valentine, 145 U. S. 611, 618, 12 Sup. Ct. Rep. 972."

In the case of *Alaska Treadwell Gold Mining Company v. Whelan*, 168 U. S. 68; 42 L. ed. 390, it appeared that the foreman of a mine crew whose duty it was to warn the men under him when he drew a chute of ore, negligently failed to give such notice or warning, and the plaintiff was by reason thereof drawn into the chute and severely injured. Therefore, in this case, too, there was an implied assurance of safety, coupled with a direction to proceed to work, and, more than that, the shift boss was the man whose active negligence thereafter caused the injury. The Supreme Court of the United States at page 391 say:

"The evidence introduced at the trial, giving it the utmost possible effect in favor of the plaintiff, was insufficient to support a verdict for him; and the defendant's request, made at the close of the whole evidence, to instruct the jury to return a verdict for the defendant, because Finley, whose negligence was the ground of the action, was a fellow servant of the plaintiff, should have been granted.

"Finley was not a vice-principal nor a representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang

of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men.

“The case is governed by a series of recent decisions of this court, undistinguishable in their facts from this one. *Central Railroad v. Keegan*, 160 U. S. 259 (40:418); *Northern Pacific Railroad v. Charless*, 162 U. S. 359 (40:99); *Same v. Peterson*, 162 U. S. 346 (40:994); *Martin v. Atchison, T. & S. F. Railroad*, 166 U. S. 399 (41:1051). See also *Wilson v. Merry*, L. R. 1 H. L. Sc. App. Cas. 326.

“This ground being decisive of the case, no opinion need be expressed upon other questions argued at the bar.”

In the case of *N. P. Rd. Co. v. Hambly*, 154 U. S. 349; 38 L. ed. 1009, it appeared that plaintiff was a day laborer under the control of a section boss or foreman assisting in building a culvert on the defendant's railroad line. The defendant claimed that the conductor and locomotive engineer of the train which ran plaintiff down were fellow servants of the plaintiff. The Su-

preme Court of the United States held that the plaintiff could not recover because the plaintiff and the said conductor and engineer were fellow servants.

In the case of *Central R. R. Co. of New Jersey v. Keegan*, 160 U. S. 259, 40 L. ed. 418, the plaintiff was a member of a crew which moved cars at night. One O'Brien was the foreman of that crew, and the one whose duty it was to direct what cars should be taken, when and where they should be moved, when the movement should start, and where it should stop. It was in obedience to his orders that one or the other of the men employed in his crew went to one place or another and coupled or uncoupled particular cars. The negligence complained of was that O'Brien, or some one else, should have been on the rear car of those moving backward O'Brien had ordered the defendant in error to uncouple cars which he, O'Brien, had just ordered to be uncoupled from a backwardly moving train to stationary cars beyond them, without himself being on the moving cars or seeing that some one was there to exercise control over the movement. It will, therefore, be observed that in this case there was not only a direction to do a specific piece of work, but an assurance, at least implied, of safety, coupled with a failure to keep a lookout, as well as contradictory negligent orders. The only question arising in the case was as to whether or not O'Brien was a fellow servant of the plaintiff. The Supreme Court of the United States, Mr. Justice White delivering the opinion, quote with approval from the case of *O'Brien v. American Dredging Co.*, 53 N. J. L. 291, as follows:

“Whether the master retains the superintendence and management of his business, or withdraws himself from it and devolves it on a vice-principal or representative, it is quite apparent that, although the master or representative may devise the plans, engage the workmen, provide the machinery and tools, and direct the performance of the work, neither can, as a general rule, be continually present at the execution of all such work. It is the necessary consequence that the mere execution of the planned work must be intrusted to workmen and where necessary to groups or gangs of workmen, and in such case that one should be selected as the leader, boss or foreman to see to the execution of such work. This sort of superiority of service is so essential and so universal that every workman, in entering upon a contract of service, must contemplate its being made use of in a proper case. He therefore makes his contract of service in contemplation of the risk of injury from the negligence of a boss or foreman, as well as from the negligence of another fellow-workman. The foreman or superior servant stands to him, in the respect, in the precise position of his other fellow-servants.”

And again quote from the opinion in the case of N. Y. C. & H. R. R. Co., 136 N. Y. 77, as follows:

“It is quite obvious that the work of shifting cars in a railroad yard must be left in a great measure to the judgment and discretion of the servants

of the railroad who are intrusted with the management of the yard. The details must be left to them, and all that the company can do for the protection of its employees is to provide competent conservants, and prescribe such regulations as experience shows may be best calculated to secure their safety."

In commenting upon the last quotation the Supreme Court say:

"We adopt this statement as proper to be applied to the case at bar. A personal, positive duty would clearly not have been imposed upon a natural person, owner of a railroad, to supervise and control the details of the operation of switching cars in a railroad yard; neither is such duty imposed as a positive duty upon a corporation; and if O'Brien was negligent in failing to place himself or some one else at the brake of the backwardly moving cars, such omission not being the performance of a positive duty owing by the master, the plaintiff in error is not responsible therefor."

In the case of *American Bridge Co. v. Seeds*, 144 Fed. 605, it appeared that the plaintiff, an experienced bridge builder, was under the direction of a foreman. The plaintiff had only worked about ten days on this bridge. Just before the accident a fellow workman of the plaintiff had hitched the rope to two iron cords, weighing about a thousand pounds each, which it was desired to move by means of a derrick upon a traveling crane, the rope extending from the top of the traveling

crane in a slanting direction toward the iron cords. But the rope had become unloosened. At that moment the plaintiff came down from the traveling crane, and the foreman said to him, "Go there and hook that chain; don't be in such a damned hurry to get away. You men are in too damned big hurry to get away from the work. Stay there until I tell you to leave—that's what I am here for." The plaintiff walked over to the middle of the cords and wrapped the chain around them and hooked it and waited there, pursuant to the direction of the foreman, to see that the rope did not again become unhitched. The foreman stood four or five feet higher than he did and at a place where the men on the traveler could see his signals. It was the duty of the foreman to give the signal to hoist. The signal that should have been given was a signal to hoist slowly in order that the rope would take up its slack slowly so that the plaintiff could observe from the place where he stood that the rope would not become loose again. Instead of this the foreman gave a "high-ball," which signified that the load should be raised as rapidly as possible, with the result that the whole load was suddenly swung against the plaintiff and he was knocked off the bridge. It will be observed that in this case there was not only a positive direction to the plaintiff to place himself in a certain position, coupled with an implied assurance that the place was safe and that the foreman would so direct the hoisting as not to injure the plaintiff, that is that the foreman would give the usual slow signal, but the acts of the foreman in these respects were coupled with his active negligence, not

only in failing to warn the plaintiff that he was about to give the "high-ball" signal, but in actually giving such "high-ball" signal, which the foreman knew, at the time it was given, must necessarily result in throwing the mass to be lifted against the plaintiff, and which the foreman knew must result in knocking the plaintiff off the bridge onto the ice below. The Circuit Court of Appeals of the Eighth Circuit in commenting upon this evidence, say:

"The foreman was the fellow servant of the plaintiff, and the latter necessarily assumed the risk of the former's negligence, *including the risk of the order which he gave to the plaintiff*, and the risk of the signal which he gave to the man at the niggerhead. *The servant assumes the risk of the negligence of his superior servant in the direction of the command of the work*, to the same extent that he assumes the risk of the negligence of the fellow laborer by his side who is engaged in performing the work." (Citing a great number of authorities).

And in commenting further upon this state of facts the Court say:

"*There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants.* But he may lawfully reckon the natural and probable result of his action upon the supposition that his servants will obey the law and faithfully discharge their duties. The legal presumption is that they will do so and this is the only prac-

tical basis for the measurement of acts, rights, or remedies of mankind." (Citing numerous cases).

And again the Court say:

"The independent voluntary act of the foreman who gave the reckless signal which sent the iron cords against the plaintiff and knocked him off the bridge was a breach of his duty incapable of his anticipation."

And again the Court say:

"It is the duty of the master to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their work and a reasonably safe place in which they may render their service, and this duty may not be so delegated by him that he may escape liability for its breach. Nevertheless, this duty has its rational and legal limits. It does not extend to the guarding of the safety of a place or of a machine against its negligent use by the servants. The risk that a place will become unsafe, or that safe machinery will become dangerous by the negligence of the servants who use them, is one of the ordinary risks of employment which the servants necessarily assumed, which they accepted. It is a risk of *operation* and *not of construction or provision* and the duty to protect place and machinery from dangers arising from negligence in their use, is a duty of the servants who use them, and not that of the master who furnishes them."

After the last quotation found on page 611, the Court cite and analyze a large number of cases wherein it was held that the negligence of a boss or foreman in directing his men, coupled with an express or implied assurance of safety in respect of a detail of the work, is the negligence of a fellow servant and not the negligence of the master.

In the case of *Kelly v. Jutte & Foley Co.*, 104 Fed. 955, it appeared that the men were directed by the foremen to use a derrick which had not been completely installed or secured, although the foreman had been advised by one of the workmen that the derrick had not yet been secured, and that its use was unsafe. It was held that the direction of the foreman to his men to use the derrick, with knowledge on the foreman's part that the derrick was not safe or fit to use in its then condition, was the negligence of a fellow servant and not the negligence of the master.

In the case of *Lach v. Burnham*, 134 Fed. 688, it was averred in the statement that the defendants, acting through their agent the foreman, "put plaintiff to work in such an unsafe and dangerous place and negligently compelled him to work in such a dangerous and improper place and neglected to take such reasonable and proper precautions against the peculiar danger incident to the kind of work at which the plaintiff was engaged, and employed such a careless and negligent foreman under whom plaintiff worked, that the plaintiff, while attending properly and carefully to the performance of his duty, was struck and knocked down and crushed by a large piece of iron."

In commenting upon these averments the Court said:

“In my opinion, however, the testimony would not establish these averments of fault. *It was not the place that was proved to be dangerous. The real peril to which the plaintiff was exposed arose from the manner in which the foreman ordered the work to be done*, and this, I think, was negligence in his character as a fellow servant, and not in his character as a vice-principal.”

And the Court further said:

“There is evidence that the piles were unstable and the jury would have been justified, I think, in finding that the safest way to do the work would have been to push the piles over and pick up the braces from the ground. The foreman insisted, however, in taking them off singly from the top, thus running the risk of knocking or jarring the pile over while the work of removal was going on, and while the laborers were necessarily close to the ends of the braces. This was apparently an error of judgment on his part and is not to be regarded as negligence; but I repeat that it does not seem to me to be negligence in performing the master’s duty to furnish his servant a safe place to work, but negligence in performing his own duty to take down the piles of iron in a proper and careful manner.”

So in the case at bar the best that can be said of the testimony is that the shift boss Brown negligently.

or otherwise, committed an error of judgment in assuring the plaintiff that the place was safe and in directing him to proceed to work, which is in no sense a negligent act of the master.

In the case of *Cleveland C. C. & St. L. Ry Co. v. Brown*, 73 Fed. 970, it appeared that the plaintiff was working on a bridge gang whose duty it was to repair bridges, depots, platforms, and other structures. At the time of the accident to the plaintiff and his consequent injury, the gang was tearing down a transfer shed near Cairo, Illinois. It was alleged that the foreman of the bridge gang of which the plaintiff was a member had full authority and control over the men with power to hire and discharge them. In the first count it was claimed that the foreman caused a portion of the roof to be thrown with great violence against the plaintiff. In the second count it was alleged that the foreman negligently ordered and directed that a certain proper brace, which had been placed against the building, be torn down; that such proper brace constituted the principal support of that portion of the structure which was to be torn down, and that he ordered that said post be sufficiently cut near its lower end so that the structure could be thrown over. And it was further alleged in said count that, as a consequence of the negligence of the foreman in ordering the plaintiff to chop and weaken the post aforesaid, the building was precipitated upon the plaintiff. In the third count it was alleged that the foreman carelessly and negligently commanded the plaintiff to go under the said building, the roof of which had not been previously removed, and

to cut near the lower end thereof, thereby weakening the post constituting the principal support of the building, which caused the building to be precipitated upon the plaintiff. The Court held upon this state of facts that the foreman in the giving of such negligent direction was the fellow servant of plaintiff, and that for the neglect of the foreman in these respects the master was not responsible. The Court in part say:

“There is a duty on the part of the master to provide his servants with a safe place in which to work, but manifestly that principle is not applicable to a case like this where the place becomes dangerous in the progress of the work either necessarily or from the manner in which the work is done.”

Assuming, if your Honors please, that in the case at bar plaintiff had requested the assistance of the shift boss in making the place safe, and the shift boss had been negligent in supervising the testing or barring down by giving negligent assurances or directions, or both, could it be said for a moment that in such case the shift boss was not a fellow servant of the plaintiff, for whose negligence in these respects the master cannot be held responsible.

The case of *Deye v. Lodge & Shipley Mach. & Tool Co.*, 137 Fed. 480, was a case where a large iron casting was being moved from a pile, and a similar one from an adjacent pile, also being removed, fell upon the plaintiff and he was injured. The plaintiff had never been engaged in the moving of such castings. He was under

the direction of a foreman by the name of Lutz. It was claimed that the negligence consisted in the failure to properly pile the said castings which had been done under the direction of Lutz. The Court held that the piling of these castings was a detail of the work, and that the foreman was a fellow servant of the plaintiff and his neglect or negligence in properly piling these castings was to be regarded as the negligence of a fellow servant. The Court say:

“If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as risks of the occupation. If it is the duty of the defendant company to see that Lutz used sticks in piling these castings while waiting the next step in the work upon them, it would be hard to say why it would not be equally the duty of an employer to supervise the temporary piling or storing of brick or lumber, or stone, or barrels, or boxes containing the material to be used by the men upon the premises. Matters of this kind are not so complex or dangerous as to demand the direct supervision of the master, but are details which, from a reasonable consideration of the rule of master and servant, may be and must be left to the common sense of the men doing the work, as one of the risks of the business.”

And again the court say:

“The conclusion that we reach is that the place where the plaintiff was injured was only dangerous because of the negligence of his fellow workmen

in the manner of carrying on the work, the risk of which he assumed."

In the case of *N. P. Rd. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, it appeared that the plaintiff was a member of a railroad gang, and that he was injured by reason of the negligence of the foreman of the gang in suddenly stopping a hand car without warning, which caused a hand car following to run into the hand can under control of the boss, injuring the plaintiff. The foreman or boss had power to hire and discharge men. The Supreme Court of the United States, Mr. Justice Peckham delivering the opinion, in part at page 996, say:

"This boss of a small gang of ten or fifteen men, engaged in making repairs upon the road wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department nor was he in control of such a distinct branch of the work of the master as would be necessary to render the master liable to a co-employee for his neglect. He was in fact, as well as in law, a fellow workman; he went with the gang to the place of work in the morning, stayed with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand-car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a

shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow workmen.

“If in approaching the line of separation between a fellow workman and a superintendent of a particular and separate department there may be embarrassment in determining the question, this case presents no such difficulty. It is clearly one of fellow servants. The neglect for which the plaintiff has recovered in this case was the neglect of Holverson in not taking the proper care at the time when he applied the brake to the front car. It was not a neglect of that character which would make the master responsible therefor, because it was not a neglect of a duty which the master owes as a master to his servant when he enters his employment.”

Without reviewing we call the Court's particular attention to the following cases upon the question as to when a foreman or boss is a fellow servant:

N. P. Rd. Co. v Charless, 162 U. S. 359, 40 L. ed. 999, 1001;

New England R. R. Co. v. Conroy, 175 U. S. 323, 20 Sup. Ct. Rep. 90, 44 L. ed. 181;

Kalleck v. Deering, 161 Mass. 469, 37 N. E. 450;

Vitto v. Farley, 44 N. Y. Supp. 1;

Loughlin v. State, 11 N. E. 371 (N. Y.);

Cullen v. Norton, 26 N. E. 905 (N. Y.).

In Maxwell v. Elk Cement Lime Co., 122 N. W. 225 (Mich.), it appeared that the plaintiff was directed by the master mechanic of the defendant, whose orders it was his duty to obey, to pour water on a burning friction clutch in defendant's mill. Plaintiff procured water but refused to put out the fire until the machinery was stopped. The master mechanic went into another room after which the machine was stopped, and plaintiff, *being assured that it would be still*, stepped with one foot on a concrete pier and the other on the shaft and began pouring water onto the clutch. The master mechanic was standing in front of the plaintiff and the plaintiff having put out as much of the fire as he could, he reached the pail to the master mechanic and as he was taking the pail the shaft started and plaintiff was thrown into the gear and his arm crushed. *It was held that the master mechanic and the plaintiff were fellow servants and that the defendant was not liable for the master mechanic's assurance that the machinery would be still while the plaintiff was at work thereon.*

In Larson v. McClure, 70 N. W. 662, it was held that a laborer in a gravel pit engaged in blasting the bank and shovelling gravel on cars assumes the risk of injury by the caving in of the embankment at a place where he and other laborers are at work. In this case it appeared that the foreman said that the plaintiff was not boss and to keep still. He told the men to keep at work. At the time the plaintiff went right in there to work.

The foreman, Sam Erickson, set him to work there and the plaintiff went to shovelling and loading the cars from the bank where they had taken off the crust. The foreman saw the crack and said he did not think it would come down and plaintiff shovelled there half an hour when the frozen chunk came down on him. It was nine feet long and two and a half feet thick. The Supreme Court of Wisconsin said:

“The present case does not seem to fall within the rule that the master must furnish the servant a reasonably safe place in which to work, inasmuch as the plaintiff and his fellow servants practically created the place and its attendant perils from hour to hour in the prosecution of their labors; and the condition was constantly shifting by reason of their own acts, of which, as well as the probable consequences, they must be held to have had notice. The negligence if any, in view of the case, would be that of the plaintiff and his fellow servants and the risk of it must be regarded as assumed by the plaintiff as incident to his employment, and in any view that may be taken of the case it must be regarded as a risk assumed by the plaintiff as incident to his employment. *Petaga v. Mining Co.*, (Mich.) 64 N. W. 335; *Peffer v. Cutler*, 83 Wis. 281, 284, 53 N. W. 508.”

In the case of *Showalter v. Fairbanks Morse Co.*, 60 N. W. 257 (Wis.), it appeared that the plaintiff was injured by reason of the caving in of the bank of a trench. The superintendent had assured the plaintiff

that there was no danger and told him to return to work, and it was held that such assurance did not relieve the plaintiff of the assumption of risk.

In *McKillop v. Shipbuilding Co.*, 127 N. W. 1053, it was held that the foreman of a pile driver gang was a fellow servant of the plaintiff who assisted in taking down a pile driver, and that the assurance of the foreman to the plaintiff that the bent or part which fell was securely fastened, was not binding upon the defendant, but was the assurance of a fellow servant.

In *St. Louis I. M. & S. Ry. Co. v. Needham*, 63 Federal 107, it was held that a railroad company is not liable for injuries to an employe on one train, caused by the negligence of a conductor in its employment on another train, in leaving a switch open; that the conductor and the employe are fellow servants. It was further held that the duty of opening and closing a switch in the ordinary operation of a railroad is not one of the personal duties of the master but a duty of the servant as a duty in the operation.

To the same effect see *N. P. R. Co. v. Masc*, 63 Federal 114.

In *American Telephone & Telegraph Co. v. Bower*, 49 N. E. 182 (Ind.), it was held that the negligence of a foreman who climbed a telegraph pole which had already been trenched, and loosened the wires which were the only support of another telegraph pole on which plaintiff was working, causing it to fall, thereby injuring the plaintiff, was a fellow servant with the

plaintiff. In this case it appeared that the foreman assisted the men in removing the poles and had authority to direct them and had employed and paid the plaintiff.

In the case of *McDonald v. Buckley*, 109 Fed. 290, it was held that a general foreman employed by the superintendent and having charge of the work of putting in the foundation for a warehouse and all of the employes engaged in the work, with power to employ and discharge, *while engaged in the actual work of directing the operations of a pile driver*, giving the signals to the employe for the fall of the hammer, is a fellow servant of the other members of the pile driver gang, and any negligence committed by him while thus working, resulting in injury to another workman, is his personal negligence for which the master is not responsible where there was no negligence of the master in his selection.

In the case of *Westinghouse Church, Kerr & Co. v. Callaghan*, 155 Fed. 397, it was held that *the duty of caring for the safety of a place, or of appliances in cases in which the work which the servants are employed to do necessarily changes the character of the place or of the appliances as to safety as the work progresses, is the duty of the servant to whom the work is entrusted and it is not the duty of the master*. It was further held that all who entered the employment of a common master to accomplish a common undertaking, are *prima facie* fellow servants, although their grades of service are different and some direct and

some direct and supervise the men subject to their command and their work, while others perform the labor, and that the servant assumes the risk of the negligence of his superior fellow servant in the direction of the men and the work to the same extent that he assumes the risk of the negligence of a fellow laborer who is engaged in the performance of the work.

Florence & C. C. R. Co. v. Whipps, 138 Fed. 13, (8th C. C. A.) was a case where plaintiff's intestate was a member of a section gang. It appeared that a landslide had occurred in a cut on defendant's railroad. Another gang had worked during the daytime to clear the debris away. While it was still daylight a brakeman from a stalled freight train called the foreman's attention to a crevice on the side of a rock on the mountain side. When the plaintiff's intestate's gang came on with their foreman it had gotten dark and no inspection could be made of this rock, but the foreman on the day shift said in the presence of the foreman of the shift on which plaintiff's intestate was working, upon being asked whether an examination had been made and whether it was all right: "yes, I examined it before dark, and it is all right." It did not appear that actually any such examination was made, but upon faith of the above statement the men were set to work. The action was instituted under a Colorado statute, seeking to recover not exceeding \$5,000 damages, upon the theory that the defendant failed to make proper inspection of the rock, did not prop the same and did not give the deceased the required warning.

Upon the question of the duty of the master to furnish his servants with a reasonably safe place in which to work the Court say:

“It is a general rule of law governing the relation of master and servant that it is the duty of the master to use ordinary care to furnish and maintain a reasonably safe place for the servant in which to perform his work. This rule as to ‘safe place’ only applies to such place as the master constructs, prepares or selects for such purpose. It has a very limited application to the erection of new buildings or structures, though it may apply to stagings and the like, supplied by the master; *and does not render the master responsible for dangers which necessarily inhere in the work and are only to be guarded against by the care the servants themselves shall exercise in its performance.* Such risks, including the risk of the negligence on the part of fellow servants, are assumed by all who enter into the employment.”

And again the Court say:

“It appears that John McGrath (the foreman of the previous shift) had assumed to make such examintaion as he deemed proper. *If he was negligent in this, although he was a foreman, he was engaged in a common employment with the others, and was a fellow servant. Balch v. Hass, 73 Fed. 974, 978, 20 C. C. A. 151.*”

And the Court held that, *if the foreman on the*

previous shift, or the foreman on the shift of plaintiff's intestate, was negligent in representing the place to be safe, that was the negligence of fellow servants. Citing *Northern Pacific Ry. Co. v. Dixon*, 194 U. S. 338, 343, 48 L. ed. 1006, and *Pennsylvania Co. v. Fishback*, 123 Fed. 465.

In other words here was a case, like the case at bar, where it was the duty of the servants to guard against the danger inherent in and arising in the course of the work. A direction was given to the men to work in this place coupled with an assurance that the place was safe. The assurance was given by the foreman, but he was a fellow servant, and such assurance had the same force as one which might have been given direct to plaintiff's intestate, as far as liability of the defendant was concerned. It was held that the negligence of the superior in giving such direction, coupled, as it was, with an assurance of safety, was the negligence of a fellow servant for whose acts in the premises the defendant was not answerable. This case should be read in conjunction with the case of *Lochbaum v. C. R. & N. Co.*, (infra) decided by the Circuit Court of Appeals of the 9th Circuit.

In the case of *Pennsylvania v. Fishback*, 123 Fed. 465, it appeared that the yard master not only assured the train crew on which plaintiff was working that the track was clear, but directed them to proceed along a certain track. The yard master had full power over the trains, subject to an order or rule published by the defendant that all northbound trains should come to a

full stop at a certain point and send a flagman ahead.

In commenting on the alleged negligent order and assurance, the Court at p. 470 say:

“Here what rendered the track unsafe was the presence on track No. 1 of the cars with which the plaintiff’s train collided, left presumably by some employe or employes connected with the operation of trains thereon, and the engineers and conductor of his train were led to take the track because of the direction of the yard master at Twentieth street, who had charge of the yard where it was located, communicated through the yard master at Penn street yard, and of the assurance of the latter, according to plaintiff’s contention, that said track was open and clear. No complaint is made of any lack of care in constructing or maintaining the track at the place of injury. *The sole complaint is of lack of care in permitting the cars to be there, and in directing plaintiff’s train to go there with the representation that the track was clear. This lack of care was in the operation of the railroad. The employes guilty of it were employes connected with the operation thereof. They were fellow servants, therefore, of the plaintiff in this matter, and no recovery can be had for the injury received because of their negligence.*”

We think that this case is on all fours with the case at bar. The train master had the authority to direct

the movements of the train. He did so with an express assurance of safety. He was the superior servant, but this assurance and direction was held to be the assurance and direction of a fellow servant.

And the Supreme Court of the United States, in the case of *Martin v. A. T. & St. F. Rd. Co.*, 166 U. S. 399, 41 L. ed. 1051, which was a case where the foreman of a section gang directed the plaintiff not to keep a lookout, that he, the foreman, would do that because it was his duty to do so, and assured the plaintiff that he would be warned of any danger say:

“Plaintiff then turned his head backward toward the station, when the foreman told him not to do that; that he had no business to do it, that it was not his business to watch for trains, and that he, the foreman, would take care of that. Plaintiff thereupon turned his head away from the station and continued to look north. In the meantime a worktrain backed out from the station at Albuquerque, going north, and continued backing rapidly until it was moving at the rate of 17 or 18 miles an hour. Before the men on the hand car had proceeded very far along the road they were overtaken by the worktrain, which ran over them, killing the foreman and badly injuring the plaintiff and Mares.”

In commenting upon this state of facts the Court say:

“The case of *Baltimore and O. R. Co. v. Baugh*,

149 U. S. 368 (37 L. ed. 772); *Northern P. R. Co. v. Hambly*, 154 U. S. 349 (38 L. ed. 1009); *Northern P. R. Co. v. Peterson*, 162 U. S. 346 (40 L. ed. 994); and *Northern P. R. Co. v. Charless*, 162 U. S. 359 (40 L. ed. 999)—cover this case in all its aspects, and render it entirely clear that all of the employees of the defendant herein, whose negligence caused the injury to the plaintiff, were his fellow servants at that time, and hence the defendant cannot be held liable to the plaintiff for the injuries sustained by him as a result of that negligence.

“The counsel for the plaintiff has argued before us that the defendant must be held responsible because the plaintiff had been directed by the foreman, under whose orders he was placed, to look north while he was on the car, and had received the foreman’s assurance that he (the foreman) would warn him of the approach of danger, and that as the foreman had failed to do so it was the failure of the defendant to do something which it was bound as a master to do so in furtherance of the obligation it was under to see that the plaintiff had a reasonably safe place in which to perform his work. We do not perceive that the doctrine as to the duty of the master to furnish a place for the servant to work in has the slightest application to the facts in this case.”

It is upon the authority of this case that *Alaska Treadwell M. Co. v. Whelan* (*supra*) rests.

We submit that this is conclusive of the case at bar. It is conceded, and was so held by the trial court, that in this case the duty of making the place safe was assumed by the servant. The power of the shift boss to advise in reference thereto, or even to control the same, under the rules, was not a withdrawal of this duty from the servants, and not an assumption thereof by the master. In any event, those conditions, contemplated by the rules, under which the shift boss should take control are not disclosed by the evidence. The plaintiff did not request the assistance of the shift boss; his assistance was not needed, as the plaintiff testified that he himself was able to make the place safe without such assistance or interference. As a matter of fact the interference of the shift boss was officious, not contemplated by the rules, or otherwise, and against it the master had no opportunity to guard.

This Court has recognized the rule that a shift boss or foreman is a fellow servant, not only of the miners upon his own shift under him but of the miners and shift boss upon the opposite shift.

In *Davis v. Trade Dollar Consolidated Mining Company*, 117 Fed. 122, this Court held that the negligence of a foreman in examining the face of the tunnel for missed holes, and in making a wrong report as to the location of the missed holes, was the negligence of a fellow servant and not the negligence of the vice principal of the master, which negligence the servant assumed.

And in the case of *Bunker Hill & Sullivan M. Co. v.*

Schmelling, 79 Fed. 263, this Court also recognized this rule, adopting the principle laid down in *Railroad Company v. Peterson* (*supra*) and *Mining Company v. Whelan* (*supra*).

In this case it was conceded by the defendant that it was the duty of the master to furnish the plaintiff with a reasonably safe place in which to work by first causing the stope in which the plaintiff was sent to work to be barred down and freed from loose rock. The plaintiff in that case was not required to perform those duties but was in this instance sent in to do his work before the place had been made reasonably safe. The Circuit Court of Appeals said it does not appear from the record what the duty of the shift boss was. He may, or may not, have been the fellow servant of the plaintiff depending, not upon his control of the other members of the shift, but upon the character of the acts he was required to perform. *R. R. Co. v. Peterson*, 162 U. S. 346; *Mining Co. v. Whelan*, 64 Fed. 642. If he was such a fellow servant and the accident to the plaintiff happened through his negligence the defendant was not answerable therefor.

And in the case of the *Westport*, 136 Fed. 391, this Court held that the captain of a vessel, in giving a grossly negligent direction, was a fellow servant of the libelant, not only upon principles of maritime law, but upon principles of the common law. This was a case where the master had directed the libelant to attach a rope to the capstan, the other end of which had been attached to the wharf, and the captain backed

the vessel for the purpose of bringing it closer to the wharf. The Court in commenting upon this question say:

“As has already been said, there was no evidence that the place where the libelant was hurt was unsafe unless the improper use of the capstan for the purpose of hauling the vessel from the mud alongside the wharf, made it so. And if it be true that the master did undertake to accomplish that result by means of the capstan as testified by the libelant and by two of the other sailors, while it would show gross negligence upon the part of the master, it would be the negligence of the fellow servant of the libelant for which the owner would not be liable.”

And in quoting from the case of *Olson v. Oregon Coal & Navigation Co.*, 104 Fed. 574, also decided by this Court, the Court further say:

“It is very clear that upon common-law principles the owner would not be liable for an injury sustained by one of such employes by reason of the negligence of one of his co-employes whatever his grade in the common employment.”

The Court then cite with approval the case of *Railroad Company v. Conroy* (*supra*), and say that in that case the case of *Railroad Company v. Ross*, 112 U. S. 377; 5 Sup. Ct. 184; 28 L. ed. 787, was finally and squarely overruled, and that the Supreme Court announced the true rule to be, both upon principle and

authority, that the employer is not liable for an injury to one employe occasioned by the negligence of another engaged in the same general undertaking; that it is not necessary that the servants should be engaged in the same operation or particular work; that it is enough to bring the case within the general rule of exception if they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties tending to establish the same general purpose; or, in other words, if the service of each in his particular sphere or department are directed to the accomplishment of the same general end.

In the case of *Lochbaum v. O. R. & N. Co.*, 104 Fed. 852 (9th C. C. A.) it appeared that the plaintiff was a member of a section gang clearing away debris in a caved cut. He was under the direction of a foreman. A rock came down striking him on the head and inflicting injuries. It was the plaintiff's duty to clean down the cuts under the direction of the foreman. It was contended that the foreman was the vice principal of the defendant and was negligent in not first ordering the men to scrape the banks before beginning work on the ditches and in not stationing a man to warn the gang against falling rock. Upon the question as to whether or not the foreman was a fellow servant the Court say:

“Upon this statement of the facts we think there can be no question that under the ruling of *Mining Company v. Whelan*, 168 U. S. 86, 42 L.

ed. 390, Peter Grant (the foreman) was a fellow servant of the plaintiff in error."

This case, as already indicated, should be read in connection with *Florence & C. C. R. Co. v. Whipps*, (*supra*).

From a review of the foregoing authorities we come to the inevitable conclusion that the shift boss and the plaintiff were fellow servants. The plaintiff was engaged in a detail of the work. He was engaged in making his place of work reasonably safe, as it was his duty to do under the rules and customs of the mine. The defendant owed him no duty, either in respect of making this place reasonably safe, or in respect of directing him as to the manner in which it should be done as the plaintiff was an experienced workman.

The shift boss undertook of his own volition to interfere in the work which the plaintiff was doing. He did so without the knowledge of the master, without the consent of the master, and without any special or general authority from the master to do so, and under conditions which no reasonable person could claim the master could or should have anticipated. Even if it can be contended that the shift boss was authorized to interfere in this work, that is to direct it, the same nevertheless was purely an executive detail of the work, and in either assisting or directing the plaintiff in respect thereof, the shift boss was simply a fellow servant. If, for instance, the shift boss, instead of having given the particular direction complained of, had interfered by assisting to bar down a particular

piece of rock, and the shift boss had so negligently carried on those operations as to have injured the plaintiff, it must be manifest that the plaintiff could not recover, for such negligence was the negligence of a fellow servant. If it can not be contended that the mere grade of the shift boss, his mere superiority and his power to direct and control the actions of the plaintiff, is sufficient to make the shift boss the vice principal of the master, then it can not be said that the direction or the assurance of the shift boss to the plaintiff in a matter of executive detail is the direction and the assurance of the master.

We think therefore that the case should have been taken from the jury because there was no actionable negligence proven on the part of the defendant in this case, and the plaintiff assumed this risk.

We have, of course, assumed for the purpose of this argument that the assurance and instructions were actually given. As a matter of fact the evidence as a whole in our judgment does not prove by a preponderance thereof that such assurance and instructions were given. The shift boss denied that he gave this alleged assurance and instruction and testified that what he actually did tell the plaintiff was that the place looked to him to be unsafe. In other words, cautioned the plaintiff against working under the rock. This is substantiated by the testimony of the timberman Berg, who passed by the plaintiff and also cautioned against the apparent danger, but aside from the absolute contradiction of the plaintiff by these two witnesses, the

story of the plaintiff seems to have been an eleventh hour thought. If it had been an actual fact that this assurance and direction were given, and had not been an afterthought on the part of the plaintiff, then the action would without question have been instituted upon that theory. Neither the complaint, nor the amended complaint—between the filing of which two instruments a considerable time elapsed—mention such assurance and direction, but the complaint and the amended complaint were drawn entirely upon the theory that it was the duty of the defendant and not the duty of the plaintiff to make the inspection for the purpose of determining whether there was any loose rock or not, and to see to the removal thereof.

PROPOSITION II.

The alleged order and assurance of the shift boss were contradictory of the rules adopted by defendant, and were given in violation thereof.

As has already been seen, plaintiff recognized it to be his duty under the rules, as well as the customs of defendant's mine, to inspect the particular place for danger, and to bar the ground down upon discovering any danger. We have further seen that in this case plaintiff, an experienced miner, was about to make such tests, and that he could have discovered the danger and could have efficiently guarded against the same without the assistance or interference of the shift boss. Plaintiff did not seek, nor apparently desire, the shift boss' assistance. He knew that he (the plaintiff)

had, at the time the shift boss came around, not made the examination required of him by the rules and customs, and knew the shift boss had not made, or been able to make, a personal examination. Plaintiff simply claimed that the shift boss said he had found out the place was all right. The testimony of plaintiff is:

“Q. Did he (the shift boss) say anything to you whether he had tested it himself?

“A. No. He said he found out the place was all right.” (Tr. p. 46).

The evidence discloses that actually the shift boss had made no examination himself and had no information or knowledge concerning the matter other than the casual visual examination which he was enabled to make in passing, and the plaintiff's testimony is conclusive that such examination under the then existing circumstances was entirely insufficient. We have then a positive order of the master to the plaintiff to examine the ground himself and to render it safe, fortified, as such rules were, by the customs of the mines; and further a direction to the plaintiff to notify the shift boss in case that he was unable to render his place reasonably safe, that is, encountered some special danger or some extraordinary condition, neither of which existed here. We have further an authorization and direction to the shift bosses to assist the men when required by them to do so, but nowhere do we find that, either in the rules or by virtue of the general powers of the shift boss, was the latter authorized officiously, wrongfully, and even wantonly, to interfere with the

work of the employes, by giving the alleged assurance and direction. Against such interference the defendant could not guard because he could not foresee the same. In the absence of allegation and proof of incompetence of the shift boss, and the defendant's knowledge thereof, there can be no recovery of the defendant for such acts; first, for the reason that the plaintiff himself will not be permitted to disregard and violate a positive rule of the master by accepting the alleged assurance and following the shift boss' orders, both of which violated the defendant's rules; and second, because the master had no opportunity to guard against such violation on the part of the shift boss.

That the servant who violates a rule or order of the master upon the orders of a superior servant accepts the risks of such obedience is lucidly illustrated in the case of *Indiana Natural & Illuminating Gas Co. v. Marshall*, 52 N. E. 232 (Ind.)

This was a case where the defendant had by general written and posted order directed all its men to look to the foreman, George Marshall, for instructions. By a special instruction the superintendent had instructed plaintiff to work upon the ground. Thereafter the foreman directed plaintiff to climb a pole. In this case the foreman was held a vice-principal of the master, but the court held that plaintiff obeyed the latter's instructions at his risk in view of the instruction given him by the superintendent to stay upon the ground.

The court in commenting upon the state of facts say:

“It is argued, however, by appellee’s counsel, that George Marshall, who ordered appellee to climb the pole when injured, was a vice-principal, and had authority to give instructions to employes by reason of a notice which had been posted in appellant’s building, which read: ‘On and after May 1st, all employes of the electric light company will look to George Marshall for instructions. (Signed) H. D. Natcher.’ Appellee testified, in answer to a question whether Natcher gave him orders to obey anybody else, that ‘he didn’t give me orders directly himself.’ The evidence is undisputed that if George Marshall had authority to direct appellee to do certain work, and the jury answered that he had, he got the authority from Natcher. The question then arises whether the general instructions given all the employes by the superintendent on May 1st to look to George Marshall, who had charge only of certain work, for instructions, or the special instructions given appellee by the superintendent afterwards as to particular work, should control as to that particular work. It is not shown by the jury’s answers, or by any evidence, that the special instructions given appellee about the 1st of July, that he should work on the ground, were ever rescinded, or in any way modified. The authority Natcher gave Marshall over appellee could be revoked in whole or in part, and the verdict certainly shows that appellee had instructions from the superintendent himself not to do the very work he was doing when injured.

Apellee knew that Marshall's authority was derived from Natcher, and from the jury's answers we must conclude that Natcher had given him special instructions to work on the ground. If a master employs a servant, and instructs him personally not to do certain dangerous work, it is his duty to disregard an order of a vice-principal to do that particular work; and if he chooses to disregard the instructions of the master, and follow the orders of the vice-principal, he does so at his own risk, so far as the master is concerned. An employer may have good reason for directing a particular employe not to do certain work, and, when such instructions have been given, the employe has no cause of complaint if injured in consequence of such disobedience. A foreman or vice-principal has no authority to place a liability upon the principal which the principal has expressly declined to assume. And, if an employe, as in the case at bar, chooses to disregard special instructions of his principal, and follow those of a vice principal under authority previously given, he must do so at his own risk. It is true that ordinarily the employe has the right to look to his immediate superior for directions in his work, but this rule can not be held to apply to a certain kind of work, where the master has given the employe personal instructions not to do that particular work."

There is not only no proof whatsoever in this case that the shift boss was, under the then circumstances, authorized by the master to give either such assurance

or direction, but the proof conclusively shows that he was not clothed with such authority; and that, if he actually gave such assurance and direction, it was in direct violation of his duties to the master and specifically in violation of the rules themselves.

Labatt on Master & Servant, 2nd Edition, Par. 1359, says:

“On general principles it is manifest that where the order in question was not given by the employer himself, he can not be made responsible for an injury caused by obedience to it, unless it proceed from an agent who had authority to give a direction with regard to the subject matter.”

And again in Par. 1371 says:

“There is a distinct and explicit authority for the view that an assurance of safety is binding upon an employer only when it is given by a vice-principal. This would seem to be the only logical doctrine in cases where the defendant explicitly denies the representative character of the employee from whom the assurance proceeds.”

So that, not only must it appear that the person giving the direction and assurance is acting in the capacity of a vice-principal, but it must appear that such person was authorized in that capacity to give such assurance. We have already seen that the shift boss was a fellow servant.

And in the case of *Pennsylvania Co. v. Fishback*, 123 Fed. 465, where it appeared that a rule of the company

to bring trains to a stop at a certain point was violated under the orders of a superior servant, the yard master, coupled with an assurance that the track was clear, the Circuit Court of Appeals of the 8th Circuit, say:

“The duty of complying with the rules and regulations which had been promulgated and of carefully operating the trains is a duty incumbent upon those employes to whom their operation has been entrusted. *All employes so engaged are fellow servants*, and no recovery can be had against the railroad company for an injury sustained by one of such employes due to the negligence of another.”

As has already been stated the master is in no case obligated to anticipate breaches of duty on the part of his servants. This is made very clear in the case of *American Bridge Co. v. Seeds* (*supra*), where the Court say:

“There is no duty imposed upon a master to anticipate breaches of duty on the part of his servants, but he may lawfully reckon the natural and probable result of his action upon the supposition that his servants will obey the law and faithfully discharge their duty. The legal presumption is that they will do so and this is the only practicable basis for the measurement of the acts, rights or remedies of mankind.”

In the case of *Little Rock & M. R. Co. v. Barry*, 84 Fed. 944, it appeared that a collision occurred between two trains by reasons of a violation of a rule of the de-

fendant that a brakeman should be stationed out and torpedoes placed upon the track. The Court on page 950 say:

“It was the duty of the crew of the freight train to place torpedoes on the track at least fifteen telegraph poles in the rear of their train when it stopped at the place of the collision, and to station a brakeman ten or twelve telegraph poles behind that train. The railroad company had the right to presume that its servants on these trains would obey these rules and discharge these duties, and it had the right to act upon that assumption. It was its right to calculate the nature and probable result of its acts and omissions upon this supposition. Indeed it could reckon upon no other, and it is alike impracticable and impossible to predicate and administer the rights and remedies of men on the theory that their associates and servants will either disregard their duties or violate laws. No one who reckoned on the faithful discharge of their duties by these employees could reasonably have anticipated this fatal collision as either a matter of probable consequence of the failure to give these notices, nor could it have been the result of such failure, had not the unforeseen negligence of the engineer of the extra train, and the gross and unexpected carelessness of the crew of the freight train, intervened to interrupt the natural sequence of events, to turn aside their course, and to prevent the safe operation of these trains, which was the natural and probable result of the rules and the or-

ders which the defendant gave. It was the gross negligence of these servants, which no one could anticipate, that constituted the intervening and proximate cause, without which this collision could never have been; and it is to this, and not the failure to give the notices, in our opinion, that this accident must be attributed under the maxim '*Causa proxima, non remota spectatur.*' "

So in the case at bar the defendant had a right to assume that the plaintiff and the shift boss would not violate their duty to make the place in which plaintiff was working reasonably safe—by the plaintiff in case he could do so alone, and by the plaintiff and the shift boss or others who might be called to assist, in case that the plaintiff could not make the place safe by himself. The master could not in this case have anticipated that the shift boss would, without having himself made the necessary inspection and knowing that such inspection had not been made, carelessly, negligently, and even wantonly, advise the plaintiff that the place was safe and direct him to proceed to work there.

Moreover, it is universally held that the master is not required to supervise every detail of the work. So in the case at bar it was not the duty of the master, either to make the inspection of the place where the plaintiff was working, or to make the same safe by causing the barring down of loose rock, or the removal thereof by other methods. Consequently it was not the duty of the master to instruct an experienced servant in reference to this particular piece of work, and, inasmuch as

the master had no duty to perform toward the plaintiff in this regard, it can not be said that the shift boss, in giving assurance of safety and directing the plaintiff to set to work, was acting on behalf of the master.

American Bridge Co. v. Seeds, (supra).

In *Deye v. Lodge and Shipley Machinery Tool Co* (supra), it was held that the defendant company owed no personal duty as master to supervise the manner in which the beds were piled, and could not be held liable for an injury to a fellow servant of the foreman caused by the slipping of one of the castings from a pile near which he was working and which was alleged to have been improperly built, on the theory that he was not furnished with a reasonably safe place in which to work, the piling of the castings being a detail of the work itself, the risk from which was assumed by the workman.

It therefore appears that, not only was the shift boss a fellow servant, and his alleged assurance and direction were violations of the rules themselves, but the defendant could not possibly have anticipated such flagrant violations of its rules and of the duties of the shift boss and plaintiff which they respectively owed to the defendant. And lastly the master is never required to supervise the mere executive details of the work.

We therefore respectfully submit that the judgment should be reversed.

Respectfully submitted,

FEATHERSTONE & FOX,

Wallace, Idaho,

Attorneys for Defendant.

United States
Circuit Court of Appeals
For the Ninth Circuit

FEDERAL MINING & SMELTING
COMPANY, a corporation,
Plaintiff in Error,
—vs.—
LOUIS ANDERSON,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error from the United States District Court
For the District of Idaho, Northern Division.

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Wallace, Idaho.

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STATEMENT OF THE CASE.

On May 8, 1916, Louis Anderson, the defendant in error, was permanently injured while in the performance of his duties as miner in the Morning Mine, and in the employ of the plaintiff in error, and in due course of time instituted this action to recover the sum of Fifteen Thousand Dollars, alleged as damages for the injuries received by him through the negligence of the plaintiff in error. The case was tried to a jury and a verdict rendered in favor of the defendant in error for the sum of Seven Thousand, five hundred dollars. An application for a new trial was duly made, which resulted in the verdict being reduced from Seven Thousand, five hundred dollars, to Five Thousand dollars, and a new trial denied. This cause is now before this honorable court upon a writ of error from the United States District Court for the District of Idaho, Northern Division.

We will hereafter, for convenience in this brief, refer to the plaintiff in error as the appellant, and the defendant in error as the appellee.

ARGUMENT AND AUTHORITIES.

The attorneys for appellant do not contend in their brief that appellee was not permanently injured while in the employ of the appellant, nor do they make any claim that the damages so reduced by the court below, are excessive. Therefore, we have the right to assume, and do assume, that appellant concedes that appellee was permanently injured and that the verdict as reduced is not excessive.

A careful examination of appellant's brief discloses that the judgment herein is sought to be reversed upon two grounds only, namely:

First: That appellee was not entitled to recover because it was not alleged in the complaint that the shifter, or shift boss, assured or represented to appellee that the place where he was performing his duties was safe, and directed him to proceed with his work without further testing its safety; and

Second: That the evidence is insufficient to warrant or justify the verdict and judgment.

Addressing ourselves to the first of these contentions we insist, that the well recognized rules of pleading require only ultimate facts, and not probative facts, to be pleaded. Courts are loath to permit a mere omission or technicality in a pleading to defeat the ends of justice. It is only in cases where a party is taken by surprise when his adversary attempts to

prove a fact not pleaded, that courts will reject such testimony. In other words, it must be shown to the court, as was not done in this case, that by reason of the failure of appellee to allege in his complaint that the shifter, or shift boss, assured him of the safety of the place and directed him to proceed with his work, the admission of testimony establishing these facts took appellant by surprise and placed him at a disadvantage.

The record will show that appellee and the shifter, or shift boss, Brown, were the only persons present at the time appellee states that Brown held out such assurance, and gave him such directions, and that said Brown and one Andy Berg, were the only persons who had any conversation with appellee with reference to the condition of the ground or place where he was working at the time of the accident. Both Brown and Berg were placed upon the witness stand by appellant, and testified concerning alleged conversations that they had held with appellee just prior to the accident. It therefore follows that appellant was not taken by surprise, that had the complaint contained the allegations which opposing counsel complain that it did not contain, appellant would not have been in any better position to defend the case than he was. It is an old and well established principle of law that in order to successfully avail one of an erroneous ruling made by the court against him in the trial of a case, it must be shown that such ruling injured or deprived him of some substantial right. This question was fully presented to the court below and is considered and thoroughly disposed of in the decision upon the ap-

plication for a new trial which is incorporated further on in this brief.

The testimony clearly shows that at the time of the accident appellee was using every reasonable precaution in endeavoring to make the place where he was performing his duties safe, and that while so doing the shifter, or shift boss, one Mr. Brown, informed him that the place was safe and directed him to proceed with his work. This is the testimony of appellee upon this point:

“Q. What is your name?

A. Louis Anderson.

Q. Where do you live?

A. Mullan.

Q. How long have you lived there?

A. I have lived there about,—next spring it is two years.

Q. What is your business?

A. Miner.

Q. How long have you been mining?

A. What mine do you mean?

Q. How long have you been mining altogether?

A. About eighteen or nineteen years.

Q. In what capacity? What kind of work have done in mines?

A. I was doing the last fifteen years running a machine.

Q. You have acted as a machine man for fifteen years?

A. Yes, sir.

Q. In what mines have you worked in the Coeur d’Alenes?

A. In the Morning.

Q. What other mine?

A. That is all the mine I worked in the Coeur d'Alenes.

Q. Have you worked there fifteen years?

A. No, not there, but in the United States.

Q. Where else besides the Coeur d'Alenes have you worked in a mine as a machine man?

A. I worked in Michigan, around Kerserg.

Q. How old are you ?

A. Thirty-eight.

Q. When did you first go to work for the defendant, the Federal Mining and Smelting Company- When did you first commence to work for the Federal Mining and Smelting Company?

A. I can't understand just exactly what you mean.

Q. When did you first go to work in the Morning mine?

A. In 1915 when I first gone to work.

Q. What month?

A. I couldn't tell you what month; it was in the spring time any how.

Q. Had you worked there up to the time you got hurt?

A. Yes.

Q. What kind of work were you doing in the mine all of that time?

A. In the Morning Mine?

A. Yes.

A. Machine man.

Q. Explain to the jury what a machine man does in a mine, and what kind of a machine he uses.

A. I used a buzzer. I don't know; it has got another name, but they call it a different name.

Q. Tell the jury what kind of a machine that is, and what is done with it in a mine.

THE COURT: What do you do with the machine? How do you operate it?

MR. McFARLAND: Show the jury what you do with that kind of a machine.

A. Just make a hole straight up, just a little on an incline.

Q. What makes that hole?

A. The steel in the drill.

Q. The steel that is put in this drill or driller, is that what you call it?

A. Yes, the drill.

Q. How is that machine run?

A. Just got a hammer inside, and that hammer, known the end of the steel, and then in about six inches, when the steel gone in there, and then take the steel, and you got a handle and turn, and the machine looks like a pipe something, an air pipe, and something like that, but take about four inches, maybe in some places it might be a little more, and then turn it by hand like that, holes around, the hammer and the drill, and put down against and bored.

Q. I will just ask you, is that machine run by air?

A. Yes, it is run by air.

Q. What are these holes made up in the mine for? What do you put these holes in the mine for?

A. They are blasted out, take the ore out.

Q. Now, on the 8th day of May last were you working there in the Morning mine of the defendant?

A. What is that?

Q. On the 8th day of May last were you working in the Morning mine, for the defendant?

A. Yes.

Q. What time did you start to go to work that day?

A. That was in the afternoon, when I started to go, about half past three.

Q. What did you first do when you got into the mine? Tell the jury what all you did when you first went into the mine that day?

A. I got the machine, and look around in the places, if it is safe, and you have got to look that over when the muckers come, and if you see it loose you have got to take it down.

Q. What did you do that morning? Did you find any tools?

A. No. I couldn't find the right kind of tools, what I used.

Q. What kind of tools was used for knocking down the rock or testing the inside of the mine?

A. With a bar.

Q. What kind of a bar was that? How long and how big?

A. Some bars are a little longer and some shorter. You have to use it, this kind of a bar, a high place you have got to get a long bar, and in low places you have got to get a short one.

Q. Did you find a bar there that night?

A. No.

Q. Did you find your drills as soon as you went into the mine?

A. I find a pick on the side there and some steel there, and that is all the tools I have.

Q. Did you do anything towards testing the mine to see if it was safe?

A. I was barring down the loose. I was looking for a bar first, but I couldn't find the bar, and the muckers was working pretty close, and I take a piece of steel and a drill and take them down, and the muckers can work. Then I thought I work to the place for the bar, but I was afraid the loose come down, and might be hurt, and I would get the loose down with a bar and pick and them tools that I had and I couldn't,—my machine—looked for the bar around, and I couldn't find the bar, and I come back to the machine, and I thought I try to take that machine and feel if the place was safe. I take the pick and bar and make it safe as I could, but I ain't sure that place is safe yet. I take the machine and I put the steel in and start her and drill just a little bit with the air, with that hammer, what used to be trying the steel, when they make the hole, but just a little bit, and just when I feel with my hand that steel, and put my other hand at the roof and feel, and come in that little air and work that machine, and can't make that loose rock,—you know when rock is loose or not,—you can find out that way, some big loose,—it is pretty hard to find the back loose there, three or four feet big, it is pretty hard to find

out with a bar, but you put this steel and the drill, and give it just a little bit of air, when the machine start to work, and you put another hand in the roof and the rock, and feel it, and you can feel that, whether it is loose or not. But the shifter come at the same time—

Q. What was his name?

A. Brown.

Q. What was his first name, do you know?

A. I couldn't say exactly what it is.

Q. How long had he been shift boss in that mine?

A. I couldn't tell you. He was shift boss before I come in the mine.

Q. Before you went in there?

A. Yes.

Q. What did your shift boss tell you?

A. The shift boss asked me if I ain't doing nothing here. I says yes, I was barring down the loose, and I couldn't find no bar, and I looked for a bar but couldn't find them; I had the pick and tools I had there, and take it as I come.

Q. What else did he tell you?

A. He said never mind that, that is all right, and start to work and get them holes drilled, and get the holes ready to blast tonight.

Q. Did he say anything to you about whether he had tested it himself?

A. No. He said he found out that the place was all right.

Q. He said he had found out that the place was all right?

A. Yes.

Q. What did you do when he told you that?

A. I started to drill, when he said that place is all right, started to drill and work.

Q. How long did you drill before you got hurt?

A. I think I drilled not more than ten minutes, I couldn't tell you."

While appellee was in the employ of appellant, at the time of suffering said injuries, appellant had promulgated and circulated, for the guidance and direction of its employees, a set of rules, two of which, numbered 2 and 3, respectively, were admitted in evidence upon the trial of this cause. They are as follows:

"2. It is the duty of all employees to take sufficient time to make the examinations required by these rules, to guard against any dangers from accidents in the mine or its workings.

3. Each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and, if necessary, the foreman or shift boss must be notified."

It will be seen from these rules that an employee working in the mine of appellant is required to make careful examination of the particular place in which he is employed, in order to ascertain if it is safe, and if he finds it unsafe he must take measures to remove such danger, and if necessary, he is directed to notify the foreman or shift boss.

We understand the rule of law to be that where from the very nature of the work in which the employee is engaged the premises where he is working becomes unsafe as the work progresses, and where he is by law deemed to assume the risk incident to such unsafe premises and it is his duty and not the master's to render them safe as the work progresses and he is actually in the act of rendering such premises safe, and the master comes and directs him to desist and compels him to proceed with his work, or threatens him, or assures him that the place where he is working is reasonably safe, and pursuant to such threats, command or assurances he leaves off or discontinues his effort to make such place safe, and is afterwards injured by reason of the unsafe condition of the place, he may recover unless the danger was so apparent that a reasonably prudent man would not have continued the work even in the face of such commands, threats or assurances.

The testimony in this case brings appellee clearly within this rule. It shows that when he went to work on the day when he was injured he first began to examine the condition of the wall where he was to set his machine in operation. He could not find a bar, the proper instrument, and one which should have been furnished him with which to bar down the loose rock, so he proceeded with his drill to test the wall. The evidence is that had he not been interrupted he would have proceeded until he ascertained whether the place was safe. The shifter, or shift boss, came to where he was and to some degree criticized him for not being at work, assured him that the place was safe and ordered him to proceed with his work and cease testing the wall or back of the stope.

Counsel for appellant contends that the evidence of appellee as to the assurance of safety made, and the directions given to him by the shifter, or shift boss, together with the other evidence adduced upon the trial of the cause in favor of appellee, is insufficient on which to base a verdict and judgment because, as they contend, shift boss Brown denied having had such a conversation with appellee, but on the contrary claims that he warned appellee of the dangerous condition of the place in which he was working, and because further, Andy Berg, the timberman, testified that just prior to the accident he called appellee's attention to the fact that the place was dangerous where he was working. Counsel for appellant evidently do not have in mind the principle so often declared by the highest courts of our land that a verdict based upon conflicting evidence will not be disturbed. It was for the jury and not for the court below to determine whether appellee upon the one hand, and Brown and Berg upon the other, told the truth.

WAS JOHN C. BROWN, THE SHIFT BOSS, A VICE-PRINCIPAL?

Generally speaking, it was the duty of appellant to provide appellee with a safe place to work. To be sure it was appellee's duty to make the place safe as his work progressed but it was the master's duty to give him the necessary assistance to do this. While appellee was in the employ of appellant and in the performance of his duty, appellant promulgated the rules above quoted, thereby delegating this duty to shift boss, Brown, whereby undoubtedly Brown became a

vice-principal. The master by written orders enjoined upon the servant the duty to bar down the rock and take the necessary precautions for safety, but also authorized and directed him to call upon the shift boss when necessary. By this the appellant impliedly commanded appellee to obey the instructions of the shift boss when given. It is not material whether Anderson called upon the shift boss or the shift boss voluntarily went to him; the fact remains that the duty to supervise or pass upon the attempt of the miner to make his place to work safe was delegated by the master to the shift boss and the shift boss accordingly become, and was a vice-principal and his negligence in respect to the delegated duty, is that of the master. Logically, there is no difference between the miner going to the shift boss and the shift boss going to the miner.

Whether appellee was guilty of contributory negligence or whether the risk was so great that to proceed to work even after the commands and assurances of the shift boss, was a question for the jury and it is not surprising that appellee should have taken the word of the shift boss who was held out by the master to be the authority under such conditions and who undoubtedly was placed in charge of a great number of men by reason of his superior knowledge and ability.

The authorities are that:

“Where a servant knows of defects in machinery, appliances or place of work but is by words, acts or conduct of his master lulled into a sense of safety and continues in the service and is injured by reason of such de-

fects, he may nevertheless recover unless the danger is well known to him or is so plain and obvious that a prudent, careful man would refuse to run the risks.”

26 CYC 1213.

“A servant acting under the commands or threats of his master does not assume the risk incident to the act commanded.”

26 CYC 1221. (Note 97).

“This rule applies as well when the risk is without as when the risk is within the scope of the servant’s employment, and as well when the order is given by a vice-principal or authorized agent as when it is given by the master.”

26 CYC 1223; (notes 1 and 2).

Hayworth v. Mineral Co. 79 S. W. 727;

In Bane v. Irwin, 72 S. W. 522, the mine boss was held to be a vice-principal, not a fellow servant.

Graham v. Newbery Coke Co. 18 S. W. 584.

Harder v. Hofer etc. Co. 104 Fed. 282;

“While ordinarily the law reads into contracts of employment an agreement on the servant’s part to assume the known risks of employment so far as he has the capacity to realize and comprehend them yet this implication may be abrogated by an expressed or implied contract to the contrary. If the servant complains to the master that the instrumentality appears to be dangerous and there-

upon the master commands him to proceed with the work and assures him there is no danger, the law implies a quasi new agreement whereby the master relieves the servant of his former assumption of risk and places the responsibility for resulting injuries upon the master.”

Bush v. West Yellow Pine Co. 58 S. E. 529.

Marquette Co. v. Williams, 82 N. E. 424.

City of Owensboro v. Gabbert, 122 S. W. 178.

In this case it is held that where the place of work was not such as imposed upon the master the full duty of providing a safe place but that the servant was assured by the master or representative that it was safe, he could recover for injury, as the assumption of risk did not apply in the face of the master's assurance. In this case the servant was assured by the superintendent.

Price v. Haley, 125 S. W. 720,

East Tennessee etc. v. Bowen, 137 S. W. 523;

Anderson v. Pitt. Min. Co. 114 N. W. 953;

Buckard v. Leshen Co. 117 S. W. 35;

Hoover v. West C. & M. Co. 142 S. W. 465;

Ohio Copper M. Co. v. Hutchins, 172 Fed. 201;

Postal Teleg. Co. v. Grantham, 187 Fed. 52;

Allen v. Schuan Co. 127 Fed. 609;

In Carder v. Baldwin, 81 S. W. 205, the facts were very similar to those in the case at bar. Plaintiff was held to have properly relied upon the assurance of the mine boss, who was held to be a vice-principal.

In Alaska Gold Mining Co. v. Muset, 114 Fed. 66, the

mine foreman, who had duties similar to those imposed upon shift boss, Brown, was held to be a vice-principal.

Bunker Hill & Sullivan Co. v. Jones, 130 Fed. 813.

“If the act be one that the master owes to the servant and he delegates it to another servant, that servant is a vice-principal.”

Mast v. Kern, 75 A. S. R. 58. (note.)

Counsel for appellant have cited and quoted from numerous decisions, not one of which is in point.

The decision of the eminently able court before whom this cause was tried, denying the appellant's application for a new trial, is a better brief for appellee than his counsel are able to write. It clearly and very forcefully dispells every doubt as to the shift boss being a vice-principal of appellant, and we cite it with great confidence. It is as follows:

“It must be conceded that while the case approaches, it does not fall within, the exceptional rule that where the character of the work is such that the condition of the place, in respect to safety, necessarily changes and is constantly shifting as the work progresses, the master is relieved from his primary obligation to keep the place safe. The reason this exception is that it would generally be impracticable, and sometimes impossible, for him in such case to provide a safe place. In tearing down a structure, for example, or in blasting down coal in a coal mine, or barring down rock in a mine such as the one herein involved, conditions change from moment to moment, and it is wholly beyond the power of the master to make

inspection or to provide for the safety of employees; the latter must look out for themselves. But in the instant case such was not the condition at the time of the accident. The plaintiff was not "making his own place"; he was drilling holes into, not shattering, the solid rock, or loosening that which had been shattered. He might have worked indefinitely without substantially weakening the back of the stope or affecting the safety of the place where he was at work. If the place was dangerous when he went on duty, it was so as a consequence of the blasting which had taken place before. The blasting had been completed before his shift commenced, and the evidence abundantly shows that it was entirely practicable by inspection to determine whether or not the stope was safe, and, if not, in what particular it was unsafe, and furthermore it was practicable to put it into safe condition before the plaintiff entered upon the work of drilling. The defendant's printed rules, offered in evidence, recognize the practicability of safeguarding against accidents of this character, and the testimony on both sides supports this view. Indeed I do not understand that the defendant now contends otherwise. *Bunker Hill and Sullivan M. Co. v. Jones*, 130 Fed., 813. We start out, therefore, with the premise that primarily it was the positive, non-delegable duty of the defendant to make an inspection of the stope after the blasting was completed and before the work of drilling for additional blasts was resumed. Such inspection was not a detail of operation, but related to the duty of providing a safe place to work. To meet this view, the defendant invokes another well-recognized exception to the general rule, namely, that the master is relieved from responsibility for dangerous

conditions where the injured employe, here the plaintiff, is, by express custom or contract, charged with the duty of making the place safe. In support of this branch of its defense, it introduced certain standing rules, by which employees are enjoined to take sufficient time to make the required examinations for the purpose of guarding against accidents, and to see that the place where they are employed is safe. It is very much to be doubted whether the plaintiff ever read these rules or heard them read or explained, but perhaps that consideration is unimportant in view of the conceded fact that he recognized it to be a general custom and rule in mining operations of this character for the experienced miner, such as he admits he was, when going on shift, to make a proper inspection, and, if necessary, to bar down loose or shattered rock from the back of the stope. In short, he recognized that it was his duty to look out for his own safety in this respect. In response to this contention on the part of the defendant, which he concedes to be well founded both in fact and in law, the plaintiff claims that, recognizing his duty in this respect, he was engaged in making inspection as best he could, although the appliances reasonably necessary for that purpose were not at hand, and would have been able to detect the perilous condition of the slab which later fell upon him, and would have avoided the danger, had the foreman or shift boss not assured him that the place was safe, and ordered him to go to work with his drill. There is sharp conflict in the testimony upon this issue, he asserting and the foreman denying that such a conversation took place. The foreman testified that he himself called the plaintiff's attention to what he regarded as a dangerous condi-

tion, but that the plaintiff assured him that it was all right, and that in any event he, the plaintiff, was standing in such a position that if the slab fell it would not hurt him. The instructions were very specific upon this issue, and the verdict necessarily implies that the jury believed the testimony of the plaintiff and discredited that of the foreman. It was preeminently an issue for the jury, and their finding must be accepted as conclusive of the fact. It therefore remains to consider whether or not as a matter of law the defendant can be held responsible for the consequences of the imprudent and negligent conduct of its foreman or shift boss in directing the plaintiff to forego inspection, with the assurance that the place was safe, and in ordering him to go on with his work. As I understand it, it is conceded by the defendant that if the foreman, in respect to this direction to the plaintiff, was acting for and in the place of the defendant, was in effect a vice-principal, then the defendant could properly be held responsible, (*Ohio Copper Co. v. Hutchins*, 172 Fed 201). but it vigorously protests that the shift boss, though occupying a position of superiority to the plaintiff, is in law to be deemed merely his fellow servant, and that therefore the case is one where the plaintiff, in accepting employment, assumed all risk of danger from his negligence.

The record is not very specific touching duties of the foreman, but it is fair to infer that upon his shift he had complete charge of the mining operations upon the sixteenth and eighteenth levels of the mine, comprising twenty-two floors, At the particular time he had supervision of the work of from thirty-five to forty men, who were engaged here and there

upon the several floors, and ordinarily he was able to visit each place where the work was going on twice during the shift. It is further to be inferred that he himself did no manual labor, but that his entire service was that of directing and superintending the work of others. Under these circumstances it is not entirely free from doubt that in respect to mining operations, strictly speaking, he was a fellow servant with the plaintiff. *Carnegie Steel Co. v. Yuhasz*, 224 Fed. 438. *Alaska M. Co. v. Muset*, 114 Fed. 66. But that question it is unnecessary to decide. We are here concerned with his status in relation to the positive duty of the defendant to use reasonable care to maintain the stope in a reasonably safe condition, for his imprudent instructions to the plaintiff pertained not to the manner of mining but to the matter of making the stope safe. The distinction is clearly drawn in *Kelly v. Mining Co.*, 41 Pac. 273, cited with approval in *Bunker Hill and Sullivan M. Co. v. Jones*, 130 Fed. 819.

In disposing of this particular question, I was at the trial, and upon more mature reflection I still am, inclined to attach much significance to one of the defendant's standing rules, which it offered in evidence, namely, where it is provided that "each man must ascertain by careful examination thereof that the particular place in which he is employed is safe. If found to be in an unsafe condition from any cause whatever, measures must be taken to remove such danger at once and before proceeding to work, and if necessary the foreman or shift boss must be notified." Doubtless the condition existing at the time of the accident was one falling within the class covered by this rule. Under the rule, it was the duty of the plaintiff himself

to make examination to see whether the stope was safe before he commenced work. But it further seems to be equally plain that it was the intention of the defendant to constitute the foreman or shift boss its representative in respect to matters of safety, with power to determine what to do, and with authority to direct and control the miners in respect to such matters. Suppose that the plaintiff in this case had taken the time, and had been successful in discovering the defective condition of the stope, and, concluding that the defect was of such character that he could not remedy it, he desired to appeal to the master to make the place secure, where would he have gone? How could he have communicated with the defendant? Is it not manifest that this rule directed him to go to the foreman or shift boss? Did not the rule impliedly say to him that in respect to matters of safety he was to recognize the foreman as being the principle? Otherwise why notify the shift boss? There is no further provision that the shift boss should thereupon report to any other officer or agent. The fact that here the shift boss came to the plaintiff instead of the plaintiff reporting to him, does not alter the case. If within this sphere the foreman was a vice-principal, his instructions were the instructions of the defendant, and necessarily imposed responsibility. Can there be any doubt of the consequences had the plaintiff declined to go on with his work when the foreman directed him to desist from further inspection, with the assurance that the place was safe? While the record does not expressly disclose the power of the foreman to discharge, such authority is to be inferred from the general nature and dignity of the position he occupied, and indeed in the argument it is conceded. Not that

this consideration is controlling, but it may be resorted to for light upon the question whether or not the parties understood that the plaintiff assumed the risk of the foreman's negligence in respect to conditions of safety. The doctrine contended for is so harsh that I am not inclined to give it place except upon the clearest authority. It seems to me that it would enable employers, by adopting the system here employed, practically in all cases to withdraw from the employe all substantial protection which the general rule of the master's positive, non-delegable duty was designed to afford. Nor when we come to examine the decided cases upon the subject do we find such clear authority. The defendant has furnished a very elaborate and able brief upon the question, with numerous citations. It is not strange that in none of them were the facts precisely the same. Personal injuries happen under the greatest variety of circumstances, and personal injury claims often turn upon very slight distinguishing features. It is to be presumed that, out of the great multitude of cases, counsel have cited those deemed to be most favorable to their contention. But upon examination it is found that most of them relate not to the maintenance of a safe place in which to work, but to the mere details of carrying on the work. We may briefly notice a few of them. In *City of Minneapolis v. Lundin*, (C. C. A. 8th Circuit), 58 Fed, 525, the work of blasting was being carried on continuously. Obviously it was wholly impracticable for the defendant city to keep safe the place where the plaintiff was at work. Assuming that his injury was the result of the negligence of the foreman of his gang, the court discussed the legal principles applicable, and in the course of the discus-

sion it was said that: "Whether or not the master is liable for the negligence of such a servant (a foreman) in a given case must be determined by the nature of the duty in the performance of which he was guilty of negligence. If he was engaged in discharging an absolute duty of the master the latter is liable, otherwise it is not." But here, as already shown, the action of the shift boss related to an absolute duty of the master, the duty to inspect the stope for the purpose of seeing whether or not it was safe. In *Alaska Mining Co. v. Wheelan*, 168 U. S. 86, very frequently cited, the gist of the case is stated in one sentence of the syllabus, namely: "And the corporation is not liable to one of them for an injury caused by the foreman's negligence in managing the machinery or in giving orders to the men." Very clearly there was not involved in the case any question of a safe place to work or of suitable and safe machinery and appliances. As the court said: "There was no evidence that he (the foreman) was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the man, for its use." In *Martin v. Atchison, etc., R. R. Co.*, 166 U. S. 399, the foreman of a section gang, while traveling on a hand car, directed one of his men not to look out for approaching trains, and he, the foreman, carelessly failed to keep a lookout, but clearly this negligence related only to a detail of the work. In *Larson v. McClure*, 70 N. W. 662, the court said: "The present case does not seem to fall within the rule that the master must furnish the servant a reasonably safe place in which to work, inasmuch as the plaintiff and his fellow servants

practically created the place and its attendant perils from hour to hour in the prosecution of their labors; and the condition was constantly shifting by reason of their own acts, of which, as well as the probable consequences, they must be held to have had notice." These cases are typical of the great majority of the decisions cited by counsel, and manifestly are not conclusive, even if we regard the shift boss as a fellow servant with the plaintiff insofar as concerns his primary duty of mining, as distinguished from his authority in the matter of maintaining safe conditions. In *Florence & C. C. R. Co., v. Whipps*, 138 Fed. 13, another case cited, the court lays great emphasis upon the fact that an emergency existed, and that careful inspection by the railroad company was impracticable. It was also held that plaintiff knew and was able to appreciate the perils, and assumed the risk. Still another case upon which the defendant relies. *Kelly v. Jutte & Foley Co.*, 104 Fed. 955, is not so easily distinguished, but with all due respect to the learning of the court, the reasoning of the decision does not impress me as being highly persuasive. Moreover, it seems to me to be out of harmony with the principles recognized in *Metropolitan Redwood Co. v. Davis*, (9th C. C. A.), 205 Fed. 487.

Further in support of its contention, the defendant has cited *Davis v. Trade Dollar M. Co.*, 117 Fed. 122, *Bunker Hill etc. v. Schnelling*, 79 Fed. 263, and *The Westport*, 136 Fed. 301—all decisions from the Circuit Court of Appeals of this circuit. While possibly tending to support the proposition that in matters of operation the shift boss and the plaintiff were fellow servants, the Schnelling and Westport cases have little, if

any, direct bearing upon the precise question under consideration, which pertains not to matters of operation, but to the safety of the conditions under which the operatives were required to work. The facts in the Davis case are more nearly analagous, but it is readily distinguishable. Davis, a miner, was injured by the explosion of a missed shot. As his shift came on duty he and his associates were informed by the foreman of the preceding shift that there were two missed shots, one in the back and one in the bottom of the tunnel. It turned out that one of these shots was in the breast rather than the bottom of the tunnel, but the court found that Davis knew that the preceding foreman had made no investigation, and he, the plaintiff, instead of making a careful investigation, assumed that one of the missed shots was under a pile of debris. It was held that he himself was negligent. The court says: "The rules of ordinary prudence required the plaintiff in error to require some member of his shift, before beginning to drill, to make examination in the face of the tunnel, and discover the location of the unexploded blasts, and the evidence shows that the plaintiff in error himself made the examination. The foreman of the retiring shift did not pretend to say that he had made such examination, * * * The plaintiff in error, while making his examination, did not take the trouble to remove the debris at the bottom of the tunnel, which debris he erroneously supposed concealed an unexploded hole."

In conclusion upon this point, I think it must be held that primarily it was the positive duty of the defendant, by reasonable inspection, to maintain the stope in which the plaintiff was working in a reasonably safe condition; that such inspec-

tion would reasonably have been made subsequent to the explosion of the blasts fired by the preceding crew, and the method employed by the defendant in carrying on its mining operations contemplated such inspection; that it was proper for the defendant to impose upon the members of the succeeding shift the duty of making such inspection and of barring down all loose rocks before they commenced the work of drilling, and such was the duty of the plaintiff in this case; that, as the jury found, while plaintiff was so engaged in making the place safe for work, and before he had completed his investigation, he was directed by the foreman to desist from further inspection and to go to drilling, with the assurance that the place was safe; that the defendant had constituted the foreman its representative in respect to matters of safety, with authority to receive reports from subordinate employes and to act and give directions upon its behalf and in its stead; that, therefore, in effect, when the foreman directed the plaintiff to desist from further inspection and to go to work with his drill, the defendant relieved the plaintiff from the duty imposed by its general rules, of making the place safe, and itself resumed the full obligation and responsibility of a master in that respect.

It is further earnestly insisted that a new trial should be granted because, owing to the general nature of the averments of the amended complaint, the defendant could not anticipate the claim that the foreman had given this direction to the plaintiff, and that therefore, to its great prejudice, it was taken by surprise at the trial. It must be conceded that in the light of the evidence the complaint is not free from

criticism and is somewhat misleading; it should have more particularly advised the defendant of the precise claim which would be made. I am not satisfied that counsel for the plaintiff wilfully drew the complaint in such a manner as to withhold information touching this claim. The plaintiff is a foreigner, and it was very difficult to understand him when he was upon the witness stand, and it is entirely possible that the precise nature of what occurred was not known to his counsel until he testified. I do not think that there is a variance between the allegations and proofs, for the negligence alleged and relied upon by the plaintiff is the failure of the defendant to provide a safe place in which the plaintiff was required to work. It is true that in the course of the trial it appeared from one aspect of the testimony that the defendant had relieved itself of this obligation, and that the plaintiff himself had assumed it, but, as I have held, from another aspect of the testimony, it appears that by reason of the directions of the foreman to the plaintiff, he, the plaintiff, was temporarily relieved from such obligation, and that the defendant thus resumed full responsibility in the premises, and that the accident occurred as a result of its failure to discharge its obligations thus temporarily resumed, so that after all the charge in the complaint that the defendant failed to provide a safe place to work is sustained by the proof. As I have already stated, the complaint is subject to criticism in being inaccurate and in not being sufficiently definite, but the defendant made no claim at the trial that it would suffer any serious prejudice if the trial was permitted to proceed, and even now though arguing that it was taken by surprise, and that it could present a much

better record upon another trial, no showing has been made of the respects in which additional testimony could be adduced. Apparently all persons who had any knowledge of what occurred were present and testified, and no showing is now offered touching any additional specific evidence. I do not think that under the circumstances I would be justified in granting a new trial upon this ground alone.

Finally it is contended that the verdict is excessive, and I am inclined to concur in this view. Such was the very strong impression I had at the time it was returned, and I have not been able to escape the conviction that it ought to be set aside, if it is not diminished. The rules under which such action is taken, and the conditions justifying it, are well understood and need not be discussed. I have therefore concluded to direct that unless the plaintiff is willing to remit \$2500.00 of the verdict, and let it stand for \$5000.00, a new trial will be granted. A written statement remitting the \$2500.00 should be filed with the clerk within ten days from the date hereof, otherwise an order will be entered granting a new trial."

In our opinion, based upon the authorities above cited, and upon the learned opinion of the Honorable Frank D. Dietrich, Judge of the court below, the judgment should be affirmed.

Respectfully submitted.

McFARLAND & McFARLAND,

Attorneys for Defendant in Error.

P. O. Address, Coeur d'Alene, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SIMPLEX WINDOW COMPANY, a Corporation,

Appellant,

vs.

HAUSER REVERSIBLE WINDOW COMPANY, a Corporation, FRED HAUSER and JESSIE HAUSER,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
Second Division.

Filed

AUG - 1 1917

F. D. Monckton,

Clerk.

United States
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UNITED STATES OF AMERICA.

*District Court of the United States, Northern
District of California.*

CLERK'S OFFICE.

No. 244—IN EQUITY.

THE SIMPLEX WINDOW COMPANY,
Plaintiff,
vs.

HAUSER REVERSIBLE WINDOW COMPANY
et al.,
Defendants.

Praecipe for Transcript of Record.

To the Clerk of Said Court:

SIR: Please prepare record on appeal in the above-entitled case to consist of the following papers:

1. Bill of Complaint.
2. Answer.
3. Memorandum of Judge Rudkin.
4. Final Decree.
5. Stipulation Fixing Amount of Security on Appeal.
6. Petition for Order Allowing Appeal.
7. Assignment of Errors on Appeal.
8. Order Allowing Appeal.
9. Bond on Appeal.
10. Stipulation Admitting Incorporation of Plaintiff and Defendant and Permitting Use of Uncertified Copies of Patents.
11. Statement of Evidence on Appeal.

2 *The Simplex Window Company vs.*

12. Stipulation *in re* Statement of Evidence on Appeal.
13. Order Allowing Withdrawal of Original Exhibits.
14. Citation on Appeal.
15. Certificate of Clerk to Record on Appeal.

JOHN H. MILLER,
Attorney for Plaintiff. [1*]

Service of the within Praecipe for Transcript on Appeal admitted this — day of May, 1917.

SCRIVNER & HETTMAN,
Attys. for Defendants.

[Endorsed]: Filed May 9, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [2]

*In the District Court of the United States for the
Northern District of California, Second Division.*

THE SIMPLEX WINDOW COMPANY,
Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COMPANY,
FRED HAUSER and JESSIE HAUSER,
Defendants.

**Bill of Complaint for Infringement of Patents Nos.
1,072,669 and 1,159,604.**

Plaintiff above named complains of the defendants above named, and for cause of action alleges:

*Page-number appearing at foot of page of original certified Transcript of Record.

1. That the full name of the plaintiff is The Simplex Window Company, and during all the times hereinafter mentioned said plaintiff was and still is a corporation created under the laws of the State of California and having its principal place of business in the City and County of San Francisco, State of California.

2. That the full names of the defendants are Hauser Reversible Window Company, Fred Hauser and Jessie Hauser, and that at all the times hereinafter mentioned said Hauser Reversible Window Company was and still is a corporation created under the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California; and during all said times the defendants, Fred Hauser and Jessie Hauser, were and are residents of the City and County of San Francisco, State of California.

3. That the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

4. That heretofore, to wit, on August 21, 1912, one [3] Arthur C. Soule was the original and first inventor of a certain new and useful invention, to wit, an improvement in windows, and on that day filed in the Patent Office of the United States an application praying for the issuance of letters patent therefor; that thereafter and before the issuance of letters patent therefor said Soule, by an instrument in writing, sold and assigned all his right, title, and interest in and to said invention and such let-

ters patent as might be issued therefor, to plaintiff herein, The Simplex Window Company.

5. That thereafter, to wit, on September 9, 1913, letters patent of the United States for the said invention, dated on said last-named date and numbered 1,072,669, were granted, issued and delivered by the Government of the United States to plaintiff herein, The Simplex Window Company, as the assignee of the said Soule, whereby there was granted to the plaintiff and its successors and assigns, the sole and exclusive right and privilege to make, use and vend the said invention throughout the United States of America and the territories thereof during the period of seventeen years from September 9th, 1915; that a more particular description of the said invention patented in and by said letters patent will fully appear from the said letters patent themselves which are ready in court to be produced by the plaintiff.

6. That heretofore, to wit, on October 31, 1911, one Arthur C. Soule and one Lewis A. Larsen were the original, first and joint inventors of a certain new and useful invention, to wit, an improvement in windows, and on said last-named date filed in the Patent Office of the United States an application for letters patent for said invention; that before the issuance of any patent therefor, said Soule and Larsen, by an instrument in writing, sold and assigned to the plaintiff herein, The [4] Simplex Window Company, all their right, title, and interest in and to said invention and such letters patent as might be issued therefor.

7. That thereafter, to wit, on November 9, 1915, letters patent of the United States for said invention, dated on said last-named date and numbered 1,159,604, were granted, issued and delivered by the Government of the United States to the plaintiff herein, The Simplex Window Company, whereby there was granted to the plaintiff, its successors and assigns the sole and exclusive right to make, use and vend the said invention throughout the United States of America and the territories thereof during the period of seventeen years from November 9, 1915; that a more particular description of said invention will fully appear from the said letters patent themselves which are ready in court to be produced by the plaintiff.

8. That the inventions covered by the said two letters patent are capable of conjoint use in one and the same machine, and have been so used by the plaintiff.

9. That ever since the issuance of said two letters patent, plaintiff has been and still is the sole owner and holder thereof, and of all the rights, liberties and privileges thereby granted, and has made, used and sold devices containing and embodying the inventions aforesaid, and upon each of the same has stamped the word "Patented," together with the dates and numbers of the said two letters patents.

10. That since the issuance of the said two letters patents, in the Northern District of California, and without the license or consent of the plaintiff, the defendants herein have jointly made, used and sold devices containing and embodying the inven-

tions patented in and by said two letters patents, and that each of the devices so made, used and sold [5] by the defendants contains the inventions patented in and by the said two letters patents.

11. That by reason of the infringement aforesaid, defendants have realized profits and plaintiff has suffered damages, but the amount of such profits and damages is unknown to the plaintiff and can be ascertained only by an accounting.

12. That plaintiff has requested the defendants to cease and desist from infringing upon the said letters patents and to account to the plaintiff for the profits and damages aforesaid, but defendants have failed and refused to comply with such request, or any part thereof.

13. That the defendants threaten to continue the said infringement, and unless restrained therefrom by this Court will continue the same, whereby plaintiff will suffer great and irreparable injury and damage, for which it has no plain, speedy, or adequate remedy at law.

WHEREFORE, plaintiff prays judgment and decree against the defendants as follows:

First. That upon final hearing the defendants herein, and each of them, their and each of their officers, agents, servants, attorneys, workmen and employees, and each of them, be permanently and firmly enjoined and restrained from making, using or selling any device, machine or apparatus which infringes upon the said letters patents, Nos. 1,072,669 and 1,159,604, or either of them, and that a writ of injunction be issued out of and under the seal of this

court enjoining the said defendants and each of them, their officers, agents, servants, attorneys, workmen and employees, and each of them, as aforesaid.

Second. That upon the filing of this bill of complaint, a preliminary injunction be granted enjoining and restraining the defendants, and each of them, their and each of their officers, [6] agents, servants, attorneys, workmen, and employees, and each of them, *pendente lite*, from making, using or selling any device, machine or apparatus which infringes upon the said letters patent, or either of them.

Third. That plaintiff have and recover from the defendants the profits realized by the defendants and each of them, and the damages sustained by the plaintiff, from and by reason aforesaid, together with costs of suit, and such other and further relief as to the Court may seem proper and in accordance with equity and good conscience.

THE SIMPLEX WINDOW COMPANY,

By L. C. LARSEN,

President.

JOHN H. MILLER,

Solicitor and Counsel for Plaintiff,

723-6 Crocker Building,

San Francisco, California.

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

A. C. Soule, being duly sworn, deposes and says that he is manager of the Simplex Window Com-

pany, plaintiff in the within-entitled action; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true.

A. C. SOULE.

Subscribed and sworn to before me this 29th day of January, 1916.

[Seal] GENEVIEVE S. DONELIN,

Notary Public in and for the City and County of San Francisco, State of California. [7]

[Endorsed]: Filed Jan. 31, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

In the District Court of the United States for the Northern District of California, Second Division.

(No. 244.)

THE SIMPLEX WINDOW COMPANY,

Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COMPANY,

FRED HAUSER and JESSIE HAUSER,

Defendants.

Answer.

The joint and several answer of Hauser Reversible Window Company, Fred Hauser and Jessie Hauser, defendants above named, to the bill of complaint of The Simplex Window Company, complainant.

These defendants, and each of them, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken and the many errors, uncertainties or any imperfections in said complainant's bill of complaint contained, come and answer thereto, or unto so much and such parts thereof as these defendants and each of them, are advised is or are material or necessary for them to make answer unto, and say:

I.

That admit that the full name of the plaintiff is The Simplex Window Company, and during all the times hereinafter mentioned said plaintiff was and still is a corporation created under the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California.

II.

They admit that the full names of the defendants are Hauser Reversible Window Company, Fred Hauser and Jessie Hauser, and that all the times hereinafter mentioned said Hauser Reversible Window Company was and still is a corporation [9] created under the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California; and that during all said times the defendants, Fred Hauser and Jessie Hauser, were and now are residents of the City and County of San Francisco, State of California.

III.

These defendants, further answering unto the said bill of complaint, say that as to whether or not on the 21st day of August, 1912, or at any other time whatsoever, one Arthur C. Soule was the original or first inventor of a certain or any new or useful invention, to wit, an improvement in windows, or any other invention whatsoever, or as to whether said alleged invention was either new or useful, these defendants are not informed save by the bill of complaint herein, and they therefore deny the same, all and singular, and leave complainant to make such proof thereof as it may be advised is material. They are not informed except by the bill of complaint herein as to whether or not before the issuance of letters patent therefor, or at any other time whatsoever, said Soule by an instrument in writing, sold or assigned to the plaintiff herein, The Simplex Window Company, all or any of his right or title or interest in or to said alleged invention in windows, or such letters patent therefor as might be issued, and they therefore deny the same, all and singular, and leave complainant to make such proof thereof as it may be advised is material.

IV.

They admit that heretofore and on August 21, 1912, one Arthur C. Soule filed in the patent office of the United States an application praying for the issuance of letters patent for an alleged improvement in windows and that thereafter and on September 9, 1913, letters patent of the United States for said alleged invention dated the said last-named date and

numbered 1,072,669, were granted, issued and delivered by the Government of the [10] United States to plaintiff herein, The Simplex Window Company, as the assignee of the said Soule.

V.

These defendants, further answering, say as to whether or not on the 31st day of October, 1911, or at any other date whatsoever, one Arthur C. Soule and one Lewis A. Larsen, were the original or first or joint inventors of a certain or any new or useful invention, to wit, an improvement in windows, or any other invention whatsoever, or as to whether said alleged invention was new or useful, these defendants are not informed save by the bill of complaint herein, and they therefore deny the same, all and singular, and leave complainant to make such proof thereof as it may be advised is material. They are not informed except by the bill of complaint herein as to whether or not before the issuance of any patent therefor, or at any other time whatsoever, said Soule and Larsen, by an instrument in writing or otherwise, sold or assigned to the plaintiff herein, The Simplex Window Company, all or any of their right or title or interest in and to said invention, or such letters patent as might be issued therefor, and they therefore deny the same, all and singular, and leave complainant to make such proof thereof as it may be advised is material.

VI.

They admit that heretofore and on the 31st day of October, 1911, one Arthur C. Soule and one Lewis

A. Larsen, filed in the Patent Office of the United States an application for letters patent for an alleged improvement in windows and that thereafter and on the 9th day of November, 1915, letters patent of the United States for said alleged invention, dated on said last-named date and numbered 1,159,604, were granted, issued and delivered by the Government of the United States to the plaintiff herein, The Simplex Window Company. [11]

VII.

That these defendants, further answering unto the said bill of complaint, say that as to whether or not ever since the issuance of said two letters patent, plaintiff has been and still is the owner and holder thereof and of all the rights, liberties and privileges thereby granted, these defendants are not informed save by the bill of complaint herein, and that they therefore deny the same, all and singular, and leave complainant to make such proof thereof as it may be advised is material.

VIII.

These defendants deny that since the issuance of said two letters patent, in the Northern District of California, and without the license or consent of the plaintiff, or at any other time or place, or under any other circumstances whatsoever, these defendants herein have jointly or severally made or used or sold devices containing or embodying the inventions patented in or by said two letters patent, or either of them, or that each of the devices or any device so made or used or sold, or in any manner made or sold by the defendants or either of them, contains

the inventions or invention patented in or by the said two letters patent, or either of them, and in this behalf these defendants allege that heretofore, to wit, on January 6, 1914, one Frederick Hauser, was the original and first inventor of a certain new and *and* useful invention, to wit, an improvement in windows and on that date filed in the Patent Office of the United States an application praying for the issuance of letters patent thereof; that thereafter, to wit, on October 20, 1914, letters patent of the United States for the said invention, dated on said last-named date and numbered 1,114,260, were granted, issued and delivered by the Government of the United States to said Frederick Hauser, one of the defendants above named, whereby there was granted to said defendant, Frederick Hauser, and his successors and assigns, the sole and exclusive right and privilege to make, use and vend the [12] said invention throughout the United States of America and the territories thereof during the period of seventeen (17) years from October 20, 1914, and that a more particular description of the said invention patented in and by said letters patent will fully appear from the said letters patent themselves, which are ready in court to be produced by said defendants.

And in this behalf defendants further allege that during the last year they have been solely engaged in making, using and selling windows containing and embodying the inventions patented in and by said letters patent thus issued to said defendant, Fred-

erick Hauser, neither of which constitutes an infringement upon the said letters patent in said plaintiff's bill of complaint referred to.

IX.

These defendants deny that by reason of the said alleged or any infringement defendants, or either of them, have realized profits or that plaintiff has suffered damages in any sum whatsoever.

X.

These defendants deny that they, or either of them, threatened to continue the said or any infringement, and deny that unless restrained therefrom by this Court they will continue the same or any infringement, and deny that plaintiff will thereby or by virtue of any act of these defendants, or any of them, suffer great or irreparable or any injury or damage, for which it has no plain or speedy or adequate remedy at law, or otherwise or at all.

XI.

These defendants, further answering unto the said bill of complaint, say that neither of the inventions claimed in said letters patent was or is an invention, but were merely the product of mechanical skill
[13] .

WHEREFORE, these defendants have fully answered unto the said bill of complaint in so far as they are advised the same is material and necessary to be answered unto, deny that the said complainant is entitled to the relief, or any part thereof, in the said bill of complaint demanded, or any relief whatsoever, prays the same advantage of its aforesaid answer as if it had pleaded and demurred to said

bill of complaint and prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

HAUSER REVERSIBLE WINDOW
COMPANY.

By FREDERICK HAUSER.
FRED HAUSER,
JESSIE HAUSER.

By their Attorney
FRANK R. SWEASEY.

FRANK R. SWEASEY,
EMIL LIESS.

Solicitors and Counsel for Defendants.
610 Humboldt Bank Building.

State of California,

City and County of San Francisco,—ss.

Frederick Hauser, being first duly sworn, deposes and says: That he is one of the defendants named in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

FREDERICK HAUSER.

Subscribed and sworn to before me this 21st day of February, 1916.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of San Francisco, State of California. [14]

Copy of the within answer received this 21st day of February, 1916.

JOHN H. MILLER.

Per JOHN R. OBER,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 23, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

*In the Southern Division of the United States Dis-
trict Court for the Northern District of Califor-
nia, Second Division.*

No. 244—IN EQUITY.

SIMPLEX WINDOW COMPANY,
Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COM-
PANY, FRED HAUSER and JESSIE
HAUSER,

Defendants.

Memorandum Opinion.

JOHN H. MILLER, Esq., for the Plaintiff.

SCRIVNER & HETTMAN, Esqs., for the De-
fendants.

RUDKIN, District Judge.

A careful examination of the testimony, exhibits and briefs in this case has failed to convince me that the charge of infringement has been made out.

The bill of complaint must, therefore, be dismissed. Let a decree be entered accordingly.

[Endorsed]: Filed March 21, 1917. Walter B. Maling, Clerk. [16]

At a stated term, to wit, the March term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Thursday, the 22d day of March, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 244.

SIMPLEX WINDOW COMPANY,

Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COMPANY, FRED HAUSER and JESSIE HAUSER,

Defendants.

Decree.

This cause coming on to be heard upon the issues raised by defendants' answer and the plaintiff's bill of complaint herein, and certain evidence (both oral and documentary) having been introduced, and said cause having been submitted to the Court for consideration and decision, and said Court having considered the same:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED: That plaintiff take nothing by the said action, and that the said complaint be, and the same is hereby, dismissed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED: That the said defendants do have and recover of and from the said plaintiff their costs and disbursements in this said suit taxed at \$88.20, and that defendants' have execution therefor.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed and entered March 22d, 1917.
Walter B. Maling, Clerk. [17]

*In the United States District Court for the Southern
Division of the Northern District of California,
Second Division.*

No. 244.

THE SIMPLEX WINDOW COMPANY,
Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COM-
PANY et al.,
Defendants.

Statement of Evidence on Appeal.

BE IT REMEMBERED that the above-entitled case came on for trial upon the issues framed by the pleadings, on January 29, 1917, in the above-entitled court, the Honorable Frank H. Rudkin presiding, and thereupon the following proceedings were had.

Plaintiff offered in evidence United States letters patent No. 1,159,604, applied for on October 31, 1911, and issued on November 9, 1915, to Simplex Window Company, plaintiff, as the assignee of Arthur C. Soule and Louis A. Larsen, joint inventors, and the same was marked "Plaintiff's Exhibit No. 1, Soule & Larsen Patent."

Plaintiff also offered in evidence United States letters patent No. 1,072,669, issued September 9, 1913, to Simplex Window Company, as the assignee of Arthur C. Soule, the same was marked "Plaintiff's Exhibit No. 2, Soule Patent."

Plaintiff's counsel stated that only claim 1 of the first named patent would be relied upon as being infringed, and only claims 1, 4 and 7 of the second patent would be relied upon as being infringed. [18]

Plaintiff then offered in evidence a model for the purpose of illustrating the first claim of the first patent, and the same was marked "Plaintiff's Exhibit No. 3, Soule & Larsen Model"; also a model of the second patent which was marked "Plaintiff's Exhibit No. 4, Model of Soule Patent"; also a model representing defendant's structure, which was claimed to be an infringement, marked "Plaintiff's Exhibit No. 5, Defendants' Structure"; also another model showing on one side the specific structure of plaintiff's patent and on the other side the specific structure of defendants' device, marked "Plaintiff's Exhibit No. 6, Combined Model."

Testimony of Baldwin Vale, for Plaintiff.

BALDWIN VALE was then called as a witness, and after being duly sworn, testified as follows: I am forty years of age and by occupation a patent solicitor, having been engaged in that business for twenty-two years. (Here defendants' counsel admitted that Mr. Vale was a competent expert.) That he had been a manufacturer and a factory superintendent; had examined and understands the mechanical construction of the device shown in "Plaintiff's Exhibit No. 1, Soule & Larsen Patent"; that "Plaintiff's Exhibit No. 3, Soule & Larsen & *Larsen Model*," correctly represented the patent; that the structure of this invention includes a window-frame having grooved side boards on both sides of the frame, in which the slidable members pivoted in the sash slide up and down vertically; then to control the movement of the sash there is the adjuster-arm pivoted in that groove or in line with the groove at the bottom, the other end of the adjustable arm being pivoted to the side of the sash at approximately the middle—on both sides of the sash; that controls the operation of the sash in swinging in and out from the frame; that part (pointing) comes out to a full reverse, from vertically closing the opening to a reverse [19] position, showing the outside of the sash turned inward toward the room; a complete reversal of the usual order; it was found in the operation of this structure that in either stormy or windy weather the sash could not be depended upon to

(Testimony of Baldwin Vale.)

maintain the position that it was fixed in by the operator, and to overcome that a latch was provided which was pivoted to the sash and provided with notches that engaged a stud fixed in the adjuster-arm, so that the sash might be locked in any position that it was placed, against movement by the elements; that latch could or could not be used according to the will of the operator; when it was not to be used, it was swung back parallel with the edge of the sash; on the opposite side is shown a modification in which the latching-arm is pivoted to the sash and engages the adjuster-arm with a frictional sliding shoe, with the same function of locking the sash in any fixed position against the action of the elements; but instead of being a definite and fixed lock, it is a sliding lock to permit the operation of the sash without manipulating the lock; it really is a retarding friction to hold the sash in any position in which it is placed; what holds it in position when the device is used is the carrier-arm that is attached to the side of the sash and engages the adjuster-arm; in the patent it is called "carrier-arms adapted to support the central portion of the sash"; the shorter arm is called an arm connected to the sash, the said arm adapted to engage the carrier-arms and lock the sash in open position; in the practice of the art these arms are generally referred to as "an adjuster-arm"; the long arm connected with the frame and with the sash is the adjuster-arm, and the other one is, for instance, called the carrier-arm.

(Testimony of Baldwin Vale.)

Regarding the second patent and model intended to represent it, marked "Plaintiff's Exhibit No. 4," this model illustrates "Plaintiff's Exhibit Patent No. 2"; the elements [20] involved in the combination being as before, a frame having vertical grooves in each side, a window sash having pivots fixed therein near the upper edge and slidable in the grooves; adjuster-arms marked No. 7 in the patent, slidably pivoted in the frame at the bottom, and having their other ends pivoted to the sides of the sash at approximately the middle; those adjuster-arms are pivoted carrier-arms marked No. 4 in the patent pivoted to the adjuster-arms, and also to the frame to support the weight of the sash and the adjuster-arms; the longer arms are the adjuster-arms, the smaller arm attached to the adjuster-arm and the frame is the carrier-arm; it moves up and down here and swings on a fixed pivot in the frame and a fixed pivot in the adjuster-arm; these adjuster-arms, as their names will indicate, adjust the position of the sash in the frame; the carrier-arm which is pivoted to the adjuster-arm, aids in supporting the weight of the sash and the adjuster-arm and distributing their strain on both sides of the fulcrum where the carrier-arm is joined to the adjuster-arm, so that the tendency of the sash to fall out of the frame is counteracted by the carrier-arm, which throws the strain on the carrier-arm from end to end, or the tensile strain, taking the great strain off the adjuster-arm, which is very important in very heavy sashes, and also contributes to the free and equipoise

(Testimony of Baldwin Vale.)

movement of the same, as the action and reaction are equal, it being necessary, where a second arm is added, that is, where an arm is connected with the adjuster-arm, to introduce a sliding element at some point; in the present model it is introduced at the lower end of the adjuster-arm; the pivots on the lower end of the adjuster-arm slide through the first mentioned grooves of the frame, a metal plate being interposed to take the friction; you can readily see by studying the model that it would be impossible to work the window unless a sliding [21] element was introduced at some point in the combination of the model; otherwise it might be dead tight, one part locking the other part; in the present model, Plaintiff's Exhibit No. 4, the sliding element is specifically located on the pivot at the lower end of the adjuster-arm, where the adjuster-arm engages the frame; in the model of defendants' structure, "Plaintiff's Exhibit No. 5," we have in combination a window frame having side grooves, vertical; we have a pivot member in the upper edge of the sash engaging the groove and pivoted to the sash to permit the vertical movement at the top of the sash, and we have adjuster-arms, as in the prior case, pivoted to the frame at the bottom and at their top pivoted to the side of the sash stiles at approximately the center of the sash; we have in this case adjuster-arms and carrier-arms pivoted to the adjuster-arms, as before, having their upper ends slidably pivoted in the sash to lock the sash in any fixed position; in

(Testimony of Baldwin Vale.)

this case, the sliding element being transferred to the sash from the prior location in the frame; the location is approximately the same, only it would be a little lower down as it passes the frame, but all the elements are there, the adjuster-arm, the carrier-arm and the sliding movement, with the same function, both sashes being reversible within the frame; the ultimate function of this short arm is to lock the sash in any desired position; it is effected by introducing a friction at the sliding pivot of the carrier-arm where it connects with the sash; this model consists of a side plate having a slot through which a pivot extends, and having a resilient spring member interposed between the under side of that plate and the groove of the sash stile, so that the friction is exerted against the side plate to retard the sliding movement of the pivotal connection with the carrier-arm; it accomplishes [22] the object of reversing the sash within the frame, that is, presents the outside of the sash to the inside of the room to facilitate the washing of the glass; it is also arranged so that when completely reversed or in the normal position the sash closes the opening of the window; these adjuster-arms control the movement of the sash and these carrier-arms assist in supporting the weight of the sash, and interpose a retarding movement to lock the sash in any desired position; I would say that they were identical in function and in operation with the plaintiff's model; the only difference at all is the transferring of the sliding element from the

(Testimony of Baldwin Vale.)

frame to the sash, which in nowise affects its operation.

Plaintiff's Exhibit No. 6 is identical in all essentials with the two models which preceded it, Nos. 4 and 5, the frames, sashes, the guides in the frame, and the pivots in the sashes engaging the guides, the adjuster-arms and the carrier-arms, and the sliding movement, are all present; the hardware or mountings in this model are identical with the hardware and mountings in the preceding models, except that on one side is shown what is called a Simplex structure, and on the other side what would be called a Hauser structure, for the purpose of illustrating that the sash will reverse within the opening, that it will close the opening, that it will slide and be guided by the adjuster-arms, that it will be locked in any position by the carrier-arms, and by the frictional sliding element; there being one of each construction on each side of the sash to show that the function and the operation is exactly identical; regarding the suggestion of the court as to a change and what that was due to, that was due to a slight discrepancy, discrepancy in the height of the sash at one side from the other; that was due to the shifting of the sliding element in this case to the sash from the sliding element in the frame on this side; but you can take what is on one side [23] and put it on the other side and get the same effect; you can take the hardware, that includes the adjuster-arm and carrier-arm, and turn them end to end, which has been done, and make the Hauser a Simplex, or

(Testimony of Baldwin Vale.)

the Simplex a Hauser; it is simply an exact reversal of the Hauser, all the elements being present, operating in exactly the same manner and performing the same function.

On cross-examination, witness Vale testified that the word "lock" has a variety of meanings, usually to hold two parts in position; that a door is locked when there is something interposed between the door and the door-jamb to hold the door in position; in a sense there is considerable difference between locking the door and retarding its opening and shutting; if, however, you merely hold the door in a fixed position, retarding might enter there; when you lock it it is in a fixed position in a sense; it might be locked mechanically, or it might be locked by friction; when it is locked it is locked; that is, a very common word in the English language; as to the difference between locking the door or anything and retarding its movement back and forth or up and down, or any other way, the locking of a door and the retarding of a door will call for the interposition of a third element some place in the action of locking, and it would depend on the position of that third element at what position the door would be locked relative to its jamb. If I were going to take out a patent for some device that would retard the motion of movement of a door, for instance, it might be called locking it; I can see an instance where it would be; for instance, the stopping of a train with an air brake, you set the shoes on the side of a rotating axis until they actually lock the wheel; then it is locked; it is being retarded of the

(Testimony of Baldwin Vale.)

tendency to go forward; when it gets to the point of being locked, it is not [24] then in the process of being retarded in its motion, because the locomotive might still be pulling and then it would be retarded in its movement by the locking; in that case I mean the wheels are locked by the brake-shoes; they may pull along, yes, they could slide; that is not the normal condition; I was simply showing you that lock and a retarding movement might be synonymous; they would be synonymous in the instance of which I told you; in that case the wheels are locked and slide, in the other case they are not locked and they revolve in the ordinary way; the action is not necessarily the same, but the whole vehicle is held or retarded in its action; the locking is a question of disposition of the parts to move and it depends upon power; it is a matter of degree; these windows are locked if there is a slight wind; they may not be locked if there is a strong wind (manipulating the model); it is locked now; it is just as much so as the wheel of a locomotive if it is deadlocked; it might be slidably moved, but it is locked (manipulating the model of defendant's device); as I told you, locking is a matter of degree; I cannot lock it, but I can lock its movement against the elements which it is calculated to overcome; I cannot lock it, not that I know of. Claim 1 of the Soule & Larsen patent has in combination with a window frame having grooves therein, the sash adapted to operate in said frame; carrier-arms adapted to support the central portion of the sash, an arm connected to the sash adapted to

(Testimony of Baldwin Vale.)

engage the carrier-arms and lock the sash in an open position; there is no arm here except the carrier-arm; the adjuster-arm is attached to the sash; that is illustrated in the first model Plaintiff's Exhibit No. 3; it has an arm connected to the sash; that is the long arm; said arm is adapted to engage the carrier-arms and lock the sash in an open position; it is in combination with a window frame having grooves therein, a sash adapted to operate [25] in said frame, carrier-arms adapted to support the central portion of the sash; this is the carrier-arm which supports the central portion of the sash; it has an arm connected to the sash, the said arm is adapted to engage the carrier-arms and lock the sash; it is locked but hardly as much as a burglar proof safe; it depends on the degree of locking; if it is locked it is locked; defendant's device, Plaintiff's Exhibit 5 is in combination with a window frame having grooves therein, a sash adapted to operate in said frame, carrier arms adapted to support the central portion of the sash, an arm connected to the sash, the said arm adapted to engage the carrier-arms and lock the sash in open position; I now lock it; if you took that off the window would seek its level; that is a fact; my theory is that this little device here is a locking device for the purpose of locking this window sash at any position that you choose to lock it; still you can open it and shut it when it is locked if you exert sufficient power to overcome it; in ordinary practice you just pull it open and shut it if you are strong enough; the difference between the power re-

(Testimony of Baldwin Vale.)

quired to open the window in the two cases is power enough to overcome the locking element in defendant's structure and power enough to break the lock in plaintiff's structure; you would not break this unless you were very violent; they are identical in function they are not identical in construction; in plaintiff's case it locks absolutely rigidly and holds the sash in its place, while in the other case it does not because you can lift it up and down at the will of the operator; it is only one function, however; in plaintiff's case the operator cannot open it unless he removes this lock; defendant's window stops and holds itself there because it has an equivalent on the other side, but the patent does not say anything about any equivalent on the other side; this model [26] is correct on this side, but you can not demonstrate this action thoroughly on a small model, there is not sufficient weight to overcome it; regarding the model of the Soule patent, Plaintiff's Exhibit No. 4, it has a window comprising a frame, a sash slidably pivoted in said frame, adjuster-arms, which are the long arms attached to the sides of the frame; one end of which being fixedly pivoted at points slightly above the middle of the sash, meaning that the two parts can move relatively to each other; that is the sides of the sash, the side-stiles, the side bars, and the other end slidably pivoted in the frame, that is the lower end of the adjuster-arm which is slidably pivoted in the frame; where you interpose the third element of the carrier-arm it is necessary to interpose a sliding element, so that all the parts in the combination can move rela-

(Testimony of Baldwin Vale.)

tively to each other; if the sliding element was not present one arm would lock the other, taking the sash in combination, and it would be impossible to move the sash that you had to slide; it has carrier-arms, one end of which is fixedly pivoted in the frame and the other end fixedly pivoted to the corresponding adjuster-arm; both of these ends are fixedly pivoted; by that I mean it cannot move from the center of their pivots, the pivots are stationary, in other words. In the defendant's device, Plaintiff's Exhibit 5, there is a window comprising a frame, which I will in this instance interpret to mean the opening; the window would be the opening and the frame would be the woodwork around the opening; it has a sash slidably pivoted in said frame, the pivot being the upper corner of the sash and slidable in the frame; it has carrier-arms one end of which is fixedly pivoted in the frame, and the other end fixedly pivoted to the corresponding adjuster-arm; in this case the carrier-arm becomes the arm that is pivoted to the adjuster-arm and slidable in the sash; in that manner supporting [27] the weight of the sash and the adjuster-arm; in the defendant's structure there is the carrier-arm attached to the adjuster-arm and slidable in the sash; I call that little arm the carrier-arm; it is part of the locking device; that is the only function of it, a locking device; it contributes to the locking; I still say it is a locking device; it is a carrier-arm and a locking device; it is a carrier because it contributes to the support of the device and it is a locking device because it prevents movement; it is no more of

(Testimony of Baldwin Vale.)

a carrier-arm in this case than in the other; it is a carrier-arm and a locking device in both; I find that they both contribute to the locking of the sash in a fixed position; my idea is that it is a locking device in Model No. 3, and in Plaintiff's Exhibit 5 it is a locking device; the long arm is also an adjuster-arm; the other is a carrier-arm; so that the locking device in No. 3 is a carrier-arm No. 5.

Claim 4 of the patent calls for a window comprising a frame, a sash in said frame, an adjuster-arm pivotally secured to one end of the frame and at the other end to said sash, and a carrier-arm pivotally secured at one end to said adjuster-arm; it is pivoted at one end to the adjuster-arm and slidably pivoted at the other end to the sash; I am referring to the Plaintiff's Exhibit No. 5; the only difference in construction between Exhibit No. 4 and Exhibit No. 5 is the pivoting of the carrier-arms to the sash in defendants' structure and the pivoting of the carrier-arm to the frame in plaintiff's structure, both contributing to the same result; in Exhibit No. 4 the carrier-arm is slidably pivoted at the bottom of the frame, whereas in the defendants' structure the carrier-arm is slidably pivoted in the sash; the slide being present in both and the same elements being present in both; the construction is the [28] same practically, but there is a slight difference in arrangement; the structure is the same because we have both structures in one model; the structures are reversible in both cases; all the elements are present, all the functions are present, but it is a different ar-

(Testimony of Baldwin Vale.)

rangement as between claims 4 and 7; the difference in arrangement is that in claim 7 it does not limit the location of the carrier-arm; it reads just as well on defendants' structure as it does on the plaintiff's; according to my idea there is absolutely no difference in the device represented by any of these models; absolutely none; any common mechanic could take one and from that build the other without any invention at all, because all the elements are present and all the functions are present and the mode of operation is practically the same; so far as the elements are concerned, the device described in the Soule & Larsen patent is the same as that described in the Soule patent, the only difference is a difference of arrangement; the two devices that are described in this Soule patent and the Larsen & Soule patent are substantially the same; one introduces friction and the other introduces the pin for locking; the function is the same; in operating Model No. 3 I unlock it by releasing the hook; that is a complete operation; the sash is standing there at a 45-degree angle; you can lift it up a little more or you can let it down or you can shut it. It can be lifted up sufficiently high to be reversed you can reverse the whole business; you can let it down half way when you want to lock it; after it is locked it performs no function at all, but just stands there, dead matter, but there is a reason why it stands there; it is because it is not heavy enough to overcome the friction that is exerted in a small model like this; if it were a large window it would flop right down shut; that is why Soule came into the art, to

(Testimony of Baldwin Vale.)

stop that; there are a number of window-sashes exactly as that is now without the locking device; [29] I know also in addition to that that they were not successful because all that were cited against this patent was what they call casement windows in which there was no weight to overcome; they were automatically locked; the moment you turn this up to a vertical plane you have a different problem entirely; it worked up and down all right, but when there is a strong wind or something of that kind, it would close up, usually of its own weight; consequently this man put on this locking device for the same purpose you would put a lock on the door, that is when you change from the casement to the vertically operating sash.

Afterwards BALDWIN VALE was recalled for further cross-examination and testified as follows:

In giving my testimony regarding the Soule & Larsen patent, I used the word "adjuster-arm" by reason of a request to do that because of a shifting of terms in the consideration of the two patents, and I was asked to give the same name in each instance; my purpose was to give the same name to the same element wherever it occurred in any of the patents or models, and that is the only reason; the words "adjuster" and "carrier" are more or less arbitrary in a patent specification; patent solicitors will call a thing by almost any name; I might not have chosen that word had I been writing the specifications; as to the difference in meaning, that is a matter of the dictionary; I think I know it; a carrier-arm may be an adjuster-arm and an adjuster-arm may be a carrier-

(Testimony of Baldwin Vale.)

arm, because in both instances in these various constructions they perform these functions; the adjuster-arm carries the sash; I would not say that it had to be adjusted before you could carry it, but I should say the other way; if I were going to carry a bucket of water from a spring on my head, I think I would carry it before I adjusted it (witness here points out in the model, [30] Plaintiff's Exhibit 3, the carrier-arm referred in the language of the patent); what he calls the carrier-arm is the adjuster-arm of this patent; it is called the adjuster-arm in the Larsen patent, it carries the sash; yes, carrier-arms adapted to support the sash; it supports the sash; also aids in the adjustment of the sash; the carrier-arm here is to aid in adjusting the sash; in reading the patent through I find that the major portion of the patent specification is given over to a description of just how the co-operating elements of this combination co-operate to manipulate the sash and hold it in positions in which it is fixed, particularly describing the functions performed by what in this patent is called the carrier-arm; on line 40, first column of the patent, you will find: "a further object of our invention is to provide simple and effective means for hanging, operating and controlling the movements of the sashes and to increase the opening space in operation"; there is controlling means described, there is no other controlling means than the friction-shoe and the carrier-arm; the frictional shoe pivots in the sash and the carrier-arm; the patent also says at folio 20,

(Testimony of Baldwin Vale.)

first column on second page, as follows: "Within the side jambs is groove 5, which may be lined with metallic strips or casing (not shown) to improve the wearing efficiency, and adapted to receive therein a slidable friction guide by which the sash 4 is pivotally supported within the window-frame in any position desired." That contributes to the support; it does not say anything about the carrier-arm mentioned, nor does it say anything about the adjustment of the sash; the carrier-arm co-operating with the friction-shoe supports the sash within the window-frame in the desired position; the friction guide consists of a shoe slidable in the grooves in the frame, which the patent states might be armed with metal to increase the frictional efficiency; then interposed between the [31] sash and that shoe is a resilient spring member so as to force the shoe against the frame laterally on both sides; that is described in folio 25 as follows: "The friction-guide just mentioned is shown in detail in Figs. 3, 4 and 5, and in modified form in Figs. 13, 14 and 15. In the first form it comprises a plate, Fig. 6, which may be secured to the outer upper edges of the sash"; I find those things in the model; I cannot find the exact shape of the spring without taking the model to pieces, but the spring is present; the shoe slides in the groove; the elliptic spring has a shoe on it for sliding in the groove integral with the spring; so far as its function is concerned, not the whole sash, but that portion of the sash supports the sash in any position desired; the friction guide system described does not support the sash in any de-

(Testimony of Baldwin Vale.)

sired position without the carrier-arm; it is true as far as the description has gone; if the carrier-arm be taken off, you would simply be having the sash hanging in the frame; it would be supported this far, it would not fall out of the frame but it would not be supported in the desired position; continuing to read from the patent where we left off: "at the pivot point 8 of the spring 7 is an anti-frictional wheel 9, which also enters and slides in the groove 5 and acts together with the spring 7 to slidably secure the sash in position within its casing," means he put on the screw 8, which is really the pivot center, an anti-friction wheel 9, which is rotatable on the pivot 8 and engages the groove so that when the sash is swung outward from the frame the roller 9 rotates on the pivot which is fixed in the sash so as not to exert any frictional rotation of the sash, but merely to exert friction in the vertical rise and fall of the head of the sash; the sentence "with the spring 7 to slidably secure the sash in position within its casing" means that the sliding spring-shoe engages the [32] groove, and prevents the head of the sash from doing as it pleases; it exerts a friction to hold the head of the sash where it may be placed or moved by the operation of the sash; it slidably secured the head of the sash which is in the casing; you find it in the drawings; the drawings are a part of this patent. Regarding the expression, "with the spring 7 to slidably secure the sash in position within its casing" it is hardly necessary to explain; the Court can certainly understand that; anyone with common sense

(Testimony of Baldwin Vale.)

would see what that means; it means that it is slidably secured within the casing by the co-operation of the elements recited; the word "stable" means more or less fixed in character, or standardized, or uniform, or holding a fixed position in the cosmic universe, not necessarily fixed, strong, or solid. The following is a definition of the word given from Webster's Unabridged Dictionary:

"STABLE—a (OF. *estable*, F. *stable*, fr. L. *stabilis*, fr. *stare* to stand. See STAND, v. i.; of Establish).

1. Firmly established; not easily moved, shaken or overthrown; fixed; steadfast; as a stable government.

2. Steady in purpose; constant; firm in resolution; unwavering; as, a man of stable character.

3. Durable; not subject to sudden change; abiding; permanent; as, a stable foundation; a stable position.

4. So placed as to resist forces tending to cause motion; of such structure as to resist distortion or molecular or chemical disturbance—said of any body or substance. Also, strong, or resistant to a breaking force.

5. Designating a governor in which any small change of speed causes the balls to move and reach a new posi-

(Testimony of Baldwin Vale.)

tion of equilibrium corresponding to to the new speed.

SYN.—Steady, abiding, strong, durable. See lasting.

Stable dextrin. See Starch,—s. equilibrium. See equilibrium, 1.

STABLE—v. t. (CF. OF. *establer*, see *Stablish*.)

To make firm or secure, to establish; confirm. OBS.

STABLE—v. i. To stand firm; also, to be established. Obs.” [33]

Folio 120, second column, page 2 of the patent reads as follows: “By the described construction the sash 4 swings entirely to one side of the frame; and by the frictional activity of the friction-guide and the supporting action of the arm 16 the sash is stably fixed in any position desired, without counterweight.” “Easily” is hardly the word; it is designed to overcome a fixed or more or less fixed condition; that is, an atmospheric condition; it is stable against ordinary wind or the power of an ordinary operator to move it; it is not absolutely fixed; it is not absolutely stable; neither is it free to move independently; in other words, the gravity and a reasonable amount of force is overcome; the difference between being stably fixed and locked is just a matter of degree; there would be invention in changing that stably fixed device by putting that so-called locking device on there because it adds to the degree of the locking; if it was firmly fixed it would not be a prac-

(Testimony of Baldwin Vale.)

tical window at any time of its operation; that is the point that he wanted to bring to the mind of anyone who read this specification, showing that he did not use the counter-weights; in other words, he did not have the old-fashioned vertically operated sash, and this was a substitute for the counter-weights; having the Soule patent and the prior art which he may have been charged with before him, I certainly do think that it required more than ordinary mechanical skill to attach such a locking device to a window-frame like that where the sash is already stably fixed in any position desired, because this mounting is applied to very heavy sashes at times, glazed with very heavy plate-glass and with either bronze or heavy mahogany frames and you cannot interpose enough friction in the small groove in the side of the frame to overcome the gravity of that sash without some other element; within [34] the intelligence of people that are supposed to read and interpret these specifications, I think it is true that by reason of this frictional activity and the supporting action of the arm 16 the sash is stably fixed in position in all cases; it is my personal opinion that it would require invention to take that patent, that device with the sash in its stable position, and for any purpose that might or might not arise put the notched arm on there, and my opinion is guided by the fact that the Patent Office saw fit to issue a patent; the notched arm performs no function by itself; you have got to combine it with another element in order to make it lock, the stud, they call it a carrier-arm

(Testimony of Baldwin Vale.)

in this patent; that is where all the confusion comes; that is a necessary physical mechanical thing that is required to co-operate with that notched arm in order to lock it, and without that lug or something to take its place, which we have on the other side, we cannot lock it; in Plaintiff's Exhibit 2, there is decidedly a locking device; it is this carrier-arm in combination with the other elements of a slide and friction; the elements are the adjuster-arm and the carrier-arm on the slide, and the frictional contact at the top of the sash; the whole thing is a lock; it is the equivalent of the device in the other patent, not any specific construction; there is no notched arm locking device in the second patent as it is not required because there are other devices to take its place; in the Soule & Larsen patent under ordinary stresses the sash is in stable equilibrium for practical purposes; it is a matter of weight; the ordinary window sashes in general use under ordinary circumstances show the sash in stable equilibrium; but it depends upon the pressure exerted against it by wind and other elements; so far as just the gravity of the sash is concerned, it is, but it is supposed to do a great deal more than merely hold itself; referring to [35] folio 25 of the Soule Patent, column 1, page 1, the plate is automatically adjusted in the frame, said plate having means for automatically adjusting its position on the frame; in setting up the frame for the first time, you hang the other elements and close your sash and find out where your plate belongs and then set up the other screws and

(Testimony of Baldwin Vale.)

then the sash is ready as long as you live; it is the plate which is automatically adjusted; referring to folio 80, column 2, page 1 of the patent, the adjuster-arms 7, or those long arms, one end of the arm is pivotally attached by pivot 9 to wearing plates 8, which are secured to the sash and the other ends are pivoted by pivot 11 to the sliding fixtures 12 at the bottom; that is at the bottom of the adjuster-arm where it engages the frame; the sliding fixtures are a metal piece shown to guide the operation of the lower end of the adjuster-arms; it is present here in the shape of a channel having overhanging flanges; the carrier-arm 4 carries the weight of the sash and the adjuster-arm; the carrier of the defendants' device is not curved; the term "stable equilibrium" means it will stay where you put it; it means something different from having the sash in a fixed position, a difference in the functional result of this combination from the functional result of the Soule-Larsen patent; they both stand in a fixed position, but this one stands in a fixed position in an improved manner; this is an improved way of holding it in fixed equilibrium; in the Soule-Larsen patent it is said "By the frictional activity of the friction-guide and the supporting action of the arm 16, the sash is stably fixed in any desired position"—these expressions mean the same thing; I should say the words speak for themselves; the equilibrium that is called for in the Soule patent is under certain circumstances greater [36] than the fixed position required in the Soule & Larsen patent; those circum-

(Testimony of Baldwin Vale.)

stances are that in the Soule & Larsen construction it is possible to lock the sash in such manner that it cannot be unlocked, and it is possible in this position to lock it in a position in which it can be moved and still remain locked; it is a more stable structure than the Soule patent; it retains its position in a superior manner over the other structure; I get at the fact that the equilibrium is greater or more powerful from practical knowledge that this type of window has come into general use, some 150,000 of them being used; I happen to have that knowledge, and I cannot divorce it from my mind, but all that is comprehended in the patent; I do not think that the stable equilibrium mentioned in the Soule patent means something more than the phrase "the frictional activity of the friction-guide and the supporting action of the arm 16, the sash is stably fixed—" is greater than the words "stably fixed." They may mean the same thing, but one device may accomplish it more perfectly than the other; the object is the same in both inventions; the object is the same in both inventions, but is arrived at by different means; it is not an endeavor to lock the window against burglars; it is desired to hold the sash in the desired position open, not closed; the object in both windows is not to lock them against violence.

Testimony of Arthur C. Soule, for Plaintiff.

The witness, ARTHUR C. SOULE, being called as a witness, testified that he is the same A. C. Soule mentioned as one of the inventors; that he is the manager of the Simplex Window Company, a cor-

(Testimony of Arthur C. Soule.)

poration; that company was engaged in the manufacture and sale of Simplex windows, a name given to the windows on which these patents were taken; the Simplex Window Company has put its invention on the market throughout the [37] Coast and throughout the Eastern States; they have been on the market since the fall of 1911; the first building they were put into was on Golden Gate Avenue near Devisadero Street in the fall of 1911; the extent of the sales of these patented windows by this company is in the neighborhood of 150,000 windows; it has spread over Washington, Oregon, California, Arizona, Texas, New York, Georgia, Florida, Louisiana, Illinois, Minnesota, Ohio; our agent in the East, which is the Pittsburg Plate Glass Company, has twenty-seven warehouses distributed throughout the United States, east of the Rocky Mountains; these windows which we have sold have been marked "Patented September 9, 1912," I think it was 1912 or 1913, whatever the date of the patent is; we marked the numbers of both patents on the windows; at the time I got up this device hinged windows similar to casements and windows similar to double hanging windows counterbalanced with weights and cords and various pivoted windows were on the market; but there were defects in the pivoted windows; I have seen on the market the Hauser windows so called by the defendants in this case; I understand their mechanical construction; the sale of the Hauser windows has not been with our con-

(Testimony of Arthur C. Soule.)

sent; defendants have been notified to desist from infringement, but they have not complied with the request; Plaintiff's Exhibit No. 5 substantially represents the windows that have been made and sold by the defendants in this case in all of its parts and functions.

Afterwards the witness, A. C. SOULE, was recalled for further examination and testified as follows:

The Larsen & Soule device was the first one that I put on the market; I sold them to the Merchants Apartments on Golden Gate Avenue, at No. 226 Judah Street, and several other [38] places that I cannot recall; I could make you a list of them; I made that invention in the beginning of 1910; I made the other invention in the beginning of 1911; I have not named all the places where I sold the Soule & Larsen device; I cannot recall all the places where I sold them; I also sold them in the Merchants Apartments on Golden Gate Ave., near Divisadero Street; 226 Judah Street, two residences in Piedmont, in Oakland, a building on Geary Street; an apartment on Sacramento Street near Jones; that is all I can recall at the present time; the Soule device was sold to the Standard Oil Building, Lankershim Hotel, all of the schoolhouses in Oakland, all of the schoolhouses in Fresno that were recently built, in the last two and a half years; two apartment houses on Sutter Street near Jones, and Cartwright Apartment House, the Flatiron Building. My inventive faculty led me to make the invention described in

(Testimony of Arthur C. Soule.)

the Soule-Larsen patent; I was working on the windows for two years previous to this and took out several patents; I have sold more of the Soule devices than the Soule-Larsen devices; I made the invention described in the Soule-Larsen Exhibit No. 2 at San Francisco; I had a shop; I had two or three employees; had one man named E. Fashman, and I had a partner named Larsen, L. A. Larsen, and I had a workman named Arthur Brown; Mr. Larsen collaborated with me in the exercise of my inventive faculty in devising the Soule-Larsen device; yes, I believe he had inventive faculty; he collaborated with me and assisted in suggestions along the line; he suggested the means for attaching the lower arm into the groove there by an additional fixture that preceded it; we worked together; it would be pretty hard to recall every little item that occurred after seven years; it was my inventive skill which devised the main portion of it; I conceived the carrier-arm and the frictional spring, and its general construction; then we took [39] it up, being partners together and worked together and co-operated, and therefore called it a joint invention; I could not remember who suggested the notched arm; it may have been Mr. Larsen, and it may have been myself; it is hard to recall all the things that would occur in a conversation or in a suggestion; I just mentioned one point which Mr. Larsen did which constituted an inventive act, that is where it engages the groove and where it is attached to the framework in the groove; he suggested an additional fixture there into which

(Testimony of Arthur C. Soule.)

the arm went when it was fastened and which you will find there at the bottom of the arm; there is a fixture that comes in to hold this (illustrating); he suggested that; it is shown in the drawings; you will find it there in the drawings; it would be in a way recognized in claim 1, which you have just mentioned, in the carrier-arms adapted to support the central portion of the sash; the adaptation of that would be its connection with the bottom of the groove, pivotally, and then the attachment to the sash, that would be where it would come in; I had not built any of these windows before Mr. Larsen made that suggestion.

Thereupon plaintiff rested, and defendants introduced in evidence U. S. letters patent No. 509,521, issued November 28, 1893, known as the Frotscher patent, and the same was duly admitted in evidence.

Defendants also offered in evidence a large model marked Defendants' Exhibit "C," being a model of the defendants' device; also another large model marked Defendants' Exhibit "D"; also another model marked Defendants' Exhibit "E," as a representative of the Soule-Larsen patent; also another model marked Defendants' Exhibit "F," which is a representation of the Soule patent; also another model marked Defendants' Exhibit "G," being a simplified form of defendants' [40] device called for by his patent; also another model marked Defendants' Exhibit "H," being a model of the defendants' Exhibit "B," known as the Frotscher Patent;

(Testimony of Frederick Hauser.)

also another model marked Defendants' Exhibit "I," being a model fashioned after "Plaintiff's Exhibit 2," the Soule Patent, and shows the prior art.

Testimony of Frederick Hauser, in His Own Behalf.

Thereupon FREDERICK HAUSER, one of the defendants, was called as a witness and testified as follows:

I was born in Germany, and have lived in this country about 37 years; my general business is that of contractor and builder; my attention was called to the window art about 50 years ago; ever since then I have been engaged in the business of constructing windows and had to help my father in the shop when I was a little boy and have been at it most all the time since I have been in the United States; I made a life study of windows; and especially of reversible windows; eight years ago I traveled over Europe and went to every Exposition and looked at the state of windows and came back here to this country again and visited the biggest cities here studying windows, and then I came back here again and made a life study of this article; have examined books and sundry articles, and all the literature on the subject, all that I could find; I am familiar with pretty near every one of the window-frames in use; I used to know Mr. Larsen, but never could say that I knew Mr. Soule; I knew Larsen since the time I started in this business, when he came to my office two years or two and a half years ago; I never was familiar with the Soule & Larsen patent since the time they

(Testimony of Frederick Hauser.)

had the patent issue and they notified me that they had a patent; I have read it lately, and I think I understand it; I have not seen any of the devices which were made under that patent; I tried to find one, but could not find one; [41] I do not know of any on the market here in town; Defendants' Exhibit "C" is a device made under my patent; I made that in accordance with my patent; the top part of it; the lower part of it is a later patent, a patent pending which has been allowed; I made them both; I made this one since I applied for a patent; that is about pretty near two years since I applied; I made the top one right at the time when I had my patent papers, my certified patent copy; in my device I had a carrier-arm, this arm here (pointing); the lower part is a carrier-arm; I call it "arm" in my specification; it only calls for an arm; I never gave it the name of "carrier-arm"; it is the arm which carries the sash; its function is to carry the sash; I have no frictional guide at the top end; I have another little device up at the top there, which I call in my specification a link; it is attached to another part where a spring is on and it guides that spring; it does not support the sash in any way that I can see; it operates the same as this Defendants' Exhibit "G," exactly the same; friction is there; that holds the sash; that keeps the sash in position, in a retarded position when you move it up and down or when you move it; that is all; it is always ready to work, so far as I understand it is always ready to work; it is not locked.

(Testimony of Frederick Hauser.)

Regarding Defendants' Exhibit "B" (the Frot-scher patent, No. 509,521, and the model thereof, Plaintiff's Exhibit "H"), there is a frame, and in that frame is a sash which slides up and down on counter-weights, and at the same time it is reversible so that they can clean it from the inside; to do that it works this way (indicating) and they pull it out, and they have got a little arm on here with notches in that, and they hook these notches in here and put the sash in a sloping position, and it stands there; it cannot move any more; the specifications say you have to release that, unlock it if you [42] want to use it and place it further up; if you want you can move it all around; that is the construction of the thing; the little arm is a locking device; comparing this Frotscher patent with the model of the Soule & Larsen patent, they have got this rope and counter-weight; that forms the carrier-arms; it carries the sash; it holds the sash up; all that is necessary is a counter-weight according to the way I just illustrated corresponds to a retarding device; when the sash is this way you can retard it just as you would do this with a spring; there is a weight which balances the window in the retarding place; in the Soule & Larsen device they have a friction which corresponds to that weight; there is a friction spring that presses against the sash and holds it up where you put it; in the matter of an arm for locking, I find exactly the same thing here; no difference in it; it is an arm with a notch and a projection or lug upon which it locks; when you put this arm on this Frot-

(Testimony of Frederick Hauser.)

schcr model upon the projecting lug it is locked in position; it is locked fixedly; in that way it corresponds to the Soule & Larsen device, it is exactly for the same purpose.

Defendants' Exhibit "I" is a window with a sash in it and represents the way it can be reversed and opened with the same device on one side, the Soule, which works the same in the windows; in other words, I have an appliance there which has the same parts as the Soule patent; this particular arm here is called the adjuster-arm; the adjuster-arm is the long one; the other arm is the hanger-arm or carrier-arm; the adjuster-arm is fixed to the sash solid on one side, and a little above the middle on plates; the adjuster-arm is slidable down on the bottom in some grooves; it slides up and down; this is the idea that I had since long years that I saw this same idea practically in operation, so far as I know about twenty-five years; it is used for the most part on awnings, on the frames, [43] on every awning pretty near in San Francisco here; on this side I have shown various arms which are in circular forms or rods; I find them on awnings in that way on a bigger scale; on the other side I have shown them as flat bars or arms, and they are adapted to show how they can be applied to the Soule patent; taking this arm here it is called the aduster-arm, and its function is to adjust the window, adjust the sash; it does so by raising the sash up; the function of this arm is the same function as the other side, an adjuster-arm, as to its extending above the sash, it

(Testimony of Frederick Hauser.)

could not be on here, but then we have to curve this end; it makes no difference in operation whether it is fastened above the sash or not; its function is a carrier-arm or hanger-arm; it has the same function just the same as the carrier-arm on the other side; we are making these straight along now; putting them in use; have been doing so about twenty years; there is no function or result that this will accomplish that the lower one does not; it is exactly the same; there are thousands of them in use here in town; I am familiar with Defendant's Exhibit "E," the model of the Soule & Larsen patent; have seen none of them in use here; never saw any windows like that but I understand it; I am familiar with Defendants' Exhibit "G," which shows a portion of a model of defendants' Hauser patent; I can not take this arm off the plaintiff's and put it on mine and make it perform the same service; it won't lock by itself; by itself it is not a locking device; it would have to be brought into play by another element; a lug on the arm—a little lock; in my device what holds the sash in its position is the spring down here connected to this plate; it is a guide spring, friction by spring. In Defendants' Exhibit "C" it is operated by a pressure spring; I found out through my experience that [44] so long as I bring a friction up here near to the center point the more results I get, and that is why I brought this as far down as possible from there, on account of the leverage; so from my experience and study I came to the conclusion that a little spring half as strong as this had

(Testimony of Frederick Hauser.)

more results than up there; by "up there" I mean like the construction of the plaintiff's device; I came to the conclusion the nearer I got to that point the more result I got, and I brought a friction spring in here right on the pivot, and I found out it gave the best results so far, without anything else; the spring device I speak of is right here over on the other side of the pivot; to show it you would have to take the plate off; this is the one I spoke of, having a patent allowed for; I got the patent; I applied for that patent two years ago in January, and since that time, afterwards, I thought I would not take it out on account I had a lawsuit against me, and I thought I had better not spend any more money on it; it has been allowed; yes, I got the allowance for it in December, 1916; it simply has a carrier-arm and a spring at the end of the carrier-arm on the sash; I have two patents and this exhibit here represents my two patents; I made quite a good many of these single-arm devices, considerable of them; some are in use here in town; most of them are in use on the outside; I furnished about four of five schoolhouses with that same device, just like that; I have no complaint so far.

In the Defendants' Exhibit "F," showing the Soule patent, the long arm is the adjuster-arm and the other arm is the carrier-arm; I can take that carrier-arm and fasten it to the sash instead of to the side of the frame, but it would not operate; it is impossible on account of it would stop the function of the sash; my arm is attached to the sash; this [45]

(Testimony of Frederick Hauser.)

one is attached to the frame, and if I undertook to put it on the sash it would not operate at all; there is no interchangeability of parts between the two devices, not for working; if you were to unscrew this carrier-arm and put it in a slide down here, it would be my machine but I would have to make it all over, make my window sash and frame.

On cross-examination, the witness Hauser testified as follows: In this model, exhibit "I," on one side I have put in a mechanism that has been in use for many years in lifting and lowering an awning; I never manufactured any of these awning fixtures myself; no, I got them manufactured; I have sold them; I never used one of these awning fixtures for opening and closing and reversing one of these windows; I merely had this model here to illustrate how that apparatus is used in an awning and what I had to compare this with; I intend now to make windows containing this awning fixture like the one I have got shown on the model; I found out in my experience that I could simplify the thing and get a better result out of my own construction instead of taking an old one; I wanted to use the one which I found the best; I am now using my own invention. In regard to this model of the Frotscher patent, (Defendant's Exhibit "B") I never have made any windows like that; I didn't want to make them like that; they are useless; I found out they are useless, with windows made that way, so I got up my own idea which is a useful device; the other one is not a practical or a useful device; I say it is not a useful device; no,

(Testimony of Frederick Hauser.)

you can not use it, but I would like to explain it a little better; you can use it, but it is, in other words, not practicable, not a practicable device; they do not use it at all any more; they used to use it but they hardly don't use it any more, not even on step-ladders; when I got up my [46] patent for my invention as to whether it required any invention or inventive faculty on my part, or whether or not any mechanic skilled in the art could have gotten up the device, that is a hard question to answer; I studied this thing and came to it in practice; I do not know what another man does; if a man rests on a thing he got up and gives it out, and another man comes and thinks it over and makes it better, he is entitled to it, if he thinks he can get anything better, that is after studying the thing further; I surely think my device is a good deal better than the old awning device; I am sure it is a good deal better than this old Frotscher device; I am sure it is; positive; as to the two devices on this big model here, the top or the lower device, I consider them both just as well; in the lower device you have a frictional device for holding the window in any position; and on the upper one I have a frictional device in a different shape, and that frictional spring tends to hold the window in position when you open it up; something of that kind is absolutely necessary in a practical window when you want to hold it in position; by it you can reverse your window and do to it whatever you want; there is no reason I know of why that awning device could not be applied to a window; they

(Testimony of Frederick Hauser.)

manufacture them that way and get the same result out of it as the other one; it had been used on windows, on window awnings, at the same time you could apply it to a sash and operate the sash; it has the same function as this; you can do it with this device; that is why I brought it as an exhibit here; I claim that it is exactly the same movement, the same function as that on this side, so far as I understand anything; by window awning I understand the outside of the window to bring a shade down. [47]

Testimony of Baldwin Vale, for Plaintiff (In Rebuttal).

BALDWIN VALE was then called in rebuttal and testified as follows:

I am familiar with what is ordinarily known and has been referred to here as an awning mechanism for raising and lowering awnings; I have been familiar with them for at least twenty years; its function is simply to raise and lower the awning; Defendants' Exhibit "I," which has been offered in evidence as representing the awning structure, I would say it is an unfair representation of the awning structure; in the first place the function of the slide in the awning support is to get the support which in this instance corresponds to the carrier-arm; on a horizontal, so that it will not strike the heads of persons passing under the awning, and any one who has ever watched the operation of an awning will notice that practically the whole canvass forming the awning will be lowered to position before this carrier-arm will suddenly flop out to a

(Testimony of Baldwin Vale.)

horizontal position, and it remains there until the awning is rewound practically to its whole extent; and then that arm will drop down again; it does not go through any synchronous movement in raising and lowering the awning; this shows a very slight movement, whereas the awning movement shows a movement from 45 to 90, or horizontal; assuming that a window was made containing the so-called awning fixtures of this model on both sides of the sash, it would not be a practically operative device for the purpose for which these windows are used, namely, to reverse them, to hold them in position at any desired point, because the moment this carrier-arm took a horizontal position, the window would become unmanageable; I doubt if it ever could be put back to its normal position without individual manipulation of its various elements; they would not co-ordinate properly; there is no frictional or other stop in this model (Defendants' Exhibit "I"); nothing whatsoever; this sash flops at will in the frame; looking [48] at the other side of the model which represents the Soule patent, I do not consider that mechanism is a fair representation of the Soule patent because they have changed the centers of leverage, and anyone who knows anything about leverage knows that fulcrum points and centers are very important; they have moved the position of the pivot where the adjuster-arm joins the sash, a great distance beyond the outside plane of the sash, not in the stile of the sash as the patent calls for and as the structure shows, but far beyond

(Testimony of Baldwin Vale.)

it; and then they have moved the lower pivot of the carrier-arm from its point in alignment with the groove of the frame, where it is called for in the patent and shown in the structure, out, you might say, to the extreme outer edge of the window-frame, exposing all the mechanism and throwing the window entirely out of balance, killing the active and reactive effect of the fulcrum points where the carrier-arm joins the adjuster-arm, where the action is not equal on both centers; in other words, the action is not equal to the reaction in this mounting as put in this Defendants' Exhibit "I"; I think it is unfair. Now, regarding Mr. Hauser's testimony as to the superiority of the bottom window in this model Exhibit "C," and the reasons given for it, Mr. Hauser said, if I quote him correctly, the nearer he got his friction to the pivotal connection where the adjuster-arm joined the sash, the greater effect that he got; but in the bottom there is only one arm so we cannot go wrong on that; the arm that is connected to the sash of the frame; he claimed that if he got his friction near the connecting point between that arm and the sash that he got a greater retarding or locking effect; I do not agree with him in that because the leverage is greater the further you get away from the fulcrum, and I think a slight pressure at a distance from the fulcrum, which in the Soule patent is on the pivot on the sash that engages the frame; that a pound of pressure there is worth several pounds of pressure at the [49] fulcrum point, because the movement is greater, and it

(Testimony of Baldwin Vale.)

is well known that the further you get out on the end of a long lever the more power you have.

On cross-examination, the witness testified that he did not deny Mr. Hauser's statement that he had made and put in use many of the windows represented by his model Exhibit "C," but he does not think it accords with accepted mechanical practice. My explanation simply amounts to, the view that the public buys something is no evidence of merit or superiority of that article; it is some evidence perhaps that it has not been severely tested. You have all the elements here in this model; you have the adjuster-arm and the carrier-arm in that model you have not got all the patentable, combinative elements; the arrangement forms a part of the invention; you have a window represented there and a sash slidably pivoted in said frame, but you have not adjuster-arms, one end of which is fixedly pivoted at points slightly above the middle of the sash stiles; you have added another element that is not present in that claim; it is not pivoted slightly above the center; I would not say it is pivoted to the sash at all; it is pivoted to a bracket; you bet it makes a difference in the operation and I went to considerable length to tell you why; if you were to take this out here and pivot it right in here, it would not work, because it would jamb; with these centers in the wrong place you can not now reverse the sash like you claim it can be done; it is all garbled up to fit conditions, it is a good enough

(Testimony of Baldwin Vale.)

model; it is not what you have left out that I am complaining of; it is what you put in; you have put in an extra element on this bracket and you have moved all the centers out of alignment; moving elements change the feature of the sash and you can not control it and can not reverse it; Plaintiff's Exhibit 4 is a correct model of the Soule device; [50] the drawings and specifications call for a carrier-arm with a curve in it, a carrier-arm which will be bent so that the window will properly close; in this model of the old form of awning device which we have here, it would be absolutely impossible by bending the iron of that according to your specifications in the Soule patent to make the window work in the same way, because you have moved all the centers; here is a little model, less than quarter size; you have moved the pivot on the sash stile with its supporting-arm 2 inches; that would amount to eight inches in a full-sized model; you have moved the center of the pivot on the adjuster-arm at the junction with the frame 2 inches; that would be 8 inches more with a full-sized sash; you would have a nice time operating it with those centers 8 inches off the center; if you put it where it belongs it would work; the arms and the way it hangs and all that in this awning device is not in accordance with the specification in the Soule patent, absolutely no; not considering the centers at all and simply taking each part of this combination we have here in the model the carrier-arm attached to the frame and to the adjuster-arm, but I will not admit that you have the

(Testimony of Baldwin Vale.)

adjuster-arm slidably pivoted in the frame and attached at a point slidably above the center of the stile in the sash; it is attached on a big projection beyond the sash, not a little one; taking this combination here of the adjuster-arm and the carrier-arm, that could be used if attached to a window, such as set forth in the Soule patent and could be made to work by changing the centers, oh, yes, if you wanted to reconstruct and rearrange it; simply putting the centers further over on the frame it could be made to work if you changed it, it would be made to work, I could make it work and any ordinary mechanic could make it work; by taking this carrier-arm and this adjuster-arm and attaching it to a window and changing the centers over, [51] but not changing the mechanism or the construction in any way, just whether or not it will work all depends on how much you change it; I want to say supplemental to what I have already said regarding the joining of the adjuster-arm to the sash, in the first place there is no pivot in an awning between the adjuster-arm and the awning; in the second place, there is no bracket, because the adjuster-arm is fixed solid to the board that they tack the end of the canvas to; and I want to deny that this model on either side represents anything in suit here that I have been examined on; this is all responsive to the question I was asked, where I was asked to compare this and state whether it was a true representation of an awning fixture; Plaintiffs' Exhibit Patent No. 4 is a true representation of the Soule Patent, Exhibit No. 2,

(Testimony of Baldwin Vale.)

because there is no significant deviation there; there is no fixed point at which that pivot pin shall be joined to the adjuster-arm; there is no fixed point at which that pivot shall be joined to the frame; if you make that arm shorter, you will join it at 10, nearer to the frame, and at 6, closer to the lower end of the adjuster-arm; the curve of the arm is not very significant, it absolutely is not; it is simply a question of esthetic value; it has no mechanism value whatever; it is a question as to whether your arm shall hang parallel with the line of that frame or be at a slight angle; it does not matter if it is at a slight angle in this, if you had changed the points of attachment down below here it would not work on a window just as well as any other apparatus because you have added not only a physical mechanical element in this bracket, but you have moved the thing all out of balance and symmetry and exposed all the hardware, whereas, it is all undisclosed in the patent; you can take the adjuster-arm and the carrier-arm from this awning device and make it work on a window and have it all enclosed so as not to expose it, and you have done it with a fair measure of [52] success in your model; I do not think it can be done without that projection; I said a little while ago, if you put it back to where it belongs it could be done, but it is all out of place the way you have it in your model; in regard to the assertion that the patent says that the curved arm is important, I do not care what it says, it works in and out; I am not interested in his bending; I claim that the bending of that arm

(Testimony of Baldwin Vale.)

is absolutely nonessential to the working of that device.

Testimony of Frederick Hauser, Recalled in His Own Behalf.

FREDERICK HAUSER was then called for further examination by his counsel, and stated that he had heard what the witness Baldwin Vale had just said, and that the witness' explanation was this, one arm here, the specification shows a long arm just as well, much longer than it shows on this one here; it is not a true representation how that works; if I put it down here or there I make it work; Mr. Vale said it could not be worked as I make it, but I can make it work in a perfectly good way; merely changing the point of connection or substituting a long arm for a short one would not require any invention, not at all, but putting the sash here, absolutely different, as called for in the specification, the curve we have in it in order to close the sash in the position; the curve is on the outside in their arm; in mine it shows exactly the same condition they have got in their specification; when they put it in first it was completely exposed to the outside; they make that curve on it so that the window comes back into place; if they expose that arm completely they put that curve on; now lately they come and construct this in a frame; it is just as easy and just as well to make a little smaller arm and make it down here; in the model it shows an arm from here to there; now they have changed that around; there is everything in this model according to their [53]

(Testimony of Frederick Hauser.)

specifications; according to that curved arm, I thought I would just represent this and use that curve in this place; I thought it was necessary to make this straight; so I made this straight; if I were to curve that I would take that point in there and it works no question; we get awnings where that is not solid, where it is loosely pivoted; we have got some that are solid; and we have some that are loose; that is all I have to say about it.

Testimony of Fred Behnke, for Defendants.

FRED BEHNKE, called as a witness, testified that his place of business was at 1284 Mission Street; and consisted of awnings; had been in the business for thirty years; that he had all kinds of awnings and sold them to the retail trade; that Defendant's Exhibit "I" on one side is a fair representation of the mechanism he used in raising and lowering an awning; this lighter-rod will hold the awning up like it will hold a window; this is a French patent on awnings made in Paris, it ran out 17 years ago, and since 17 years we have made them all, every one, in San Francisco; this is the adjuster-arm; the upper-arm is the one that holds the weight; this arm should be horizontal; this would be the lever-bar, what we call the lever-bar, which works just like it works here, this one works in and the other one works out; by turning this around, and having this straight out, and having this arm here, this can be regulated for any building; buildings are not the same types, and sometimes it will be 8 feet, 10 feet, or 9 feet; sometimes we make them 5, or 6, or 7, or 10 feet, whatever it may

(Testimony of Fred Behnke.)

be; that is just a matter of the way the building is constructed; on the other side of this model we find what appear to be flat arms used instead of the round; we used years ago flat arms, but in latest years we have used cold rolled steel; flat arms were lower a good deal, than cold rolled steel, and that is the reason we used the flat arms; years ago we used to build flat arms because they were cheaper than [54] cold rolled steel; but it is not so now any more; we used cold rolled steel on awnings.

On cross-examination the witness testified as follows:

Referring to defendant's model of the awning model, we call that long arm the out bar; in the awnings as we make them they come out straight; as to whether or not they come out in a vertical position like they are here, that depends a good deal; some buildings have them standing this way, and some have them straight down, and some have them four feet below that; I do not know who made this model; I don't know who did; as to why the maker of the model made that rod standing up there instead of coming out straight like they do in awnings, this is for a window and naturally you could not use it for an awning; then this would stand straight; it would come further down; it would come from here to here, more straight, it would have more balance there; of course I do not know anything about this; I can only say about what this arm would represent; this arm could be made so that it would work just the same by making this lever longer; in the awning structure we

(Testimony of Fred Behnke.)

extend that arm out straight, when you go to put it on this model for a window and whether you have to change it into the other position, that I do not know anything about, the window, I could not argue on the window question; the window I don't know anything about; I am not versed in window frames; I do not know about window-frames; in awnings I have been thirty years engaged; windows I don't know anything about; as to whether or not this slide on the model is higher or shorter than in an awning, some awnings would be 6 feet out and some 7 feet and some 8 and some 9, whatever it is; where the building is lower, the slide would be longer; where the building is higher the slide would be shorter; as to whether or not in order to change over the entire structure and apply it to a window, and whether you would have to change the construction [55] and arrangement considerably, I do not know anything about it; I cannot say; where a window was bigger you would have to change it, and where a window was smaller you would have to change it, I presume, like an awning; this construction here is in the exact form that is shown on awnings, but the arm is just the same; in the awning the arrangement of these parts is exactly the same as shown in this model; they are not in the same position; this stands up and down; the other one stands more straight; as to whether there is a different arrangement in these two cases I would not say; there is a lever up there; there is the slide; there are stops and everything, exactly like an

(Testimony of Fred Behnke.)

awning; they are not arranged in a different way in an awning from what they are in this model they are arranged exactly the same way; I said a moment ago that in the awning the rod came out straight, it could hang down or come higher up with an angle of 45 degrees; in some buildings they want an awning at 45 degrees, and some want them straight; it just depends on what they want; nobody wants them to come up straight like in this model, vertical; no, I have not made any like that; in the ones I have made they are arranged different but they were never made any different; they were fastened together the way this is fastened here; it should be fastened more over the middle; that is the way it should be fastened; off toward the end, but the awning rod will run up the same exactly as this; if the awning were down here and the awning came up, this frame would come up exactly like this comes up against the building; if the awning was here, it would stand like this stands now; this is the awning up; if the awning comes down this comes down; in the case of an awning what we want to do is to fold it up like this; the object of having that fixture on the awning is to roll it up; the object is to roll it down and get it in position and fold it up and get it in position; if you roll the awning [56] up it is up on the building, and if you lower your awning down it stands on an angle.

The defendants offered in evidence certified copy of file-wrapper contents of the Soule and Larsen Patent, No. 1,159,604, granted November 9, 1915,

which was duly marked by the clerk as one of defendant's exhibits.

Defendants also offered in evidence the patent issued to Frederick Hauser, dated October 20, 1914, No. 1,114,260.

The foregoing constitutes the substance of all the evidence offered at the trial.

Approved:

FRANK H. RUDKIN,
Judge.

Stipulation Re Statement of Evidence.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit that the foregoing statement constitutes all of the evidence which was offered at the trial by the respective parties, and is a full, true, and correct statement thereof in narrative form.

It is also stipulated and agreed that the paper exhibits referred to in the above statement need not be copied herein, but that the said exhibits including the said file wrapper contents of the Soule and Larsen patent, together with all the physical exhibits may be transmitted to the Circuit Court of Appeals for the Ninth Circuit, and here used by either of the parties upon the appeal of the case.

May 8, 1917.

JOHN H. MILLER,
Attorney for Plaintiff.

SCRIVNER & HETTMAN,
Attorneys for Defendants. [57]

Approved:

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed May 17, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [58]

*In the Southern Division of the District Court of
the United States, in and for the Northern Dis-
trict of California, Second Division.*

No. 244—IN EQUITY.

SIMPLEX WINDOW COMPANY,

Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COMPANY
et al.,

Defendants.

**Plaintiff's Petition for an Order Allowing an
Appeal.**

The Simplex Window Company, plaintiff in the above-entitled suit, feeling itself aggrieved by the final decree heretofore made and entered in the above case on March 22, 1917, wherein and whereby it was ordered, adjudged and decreed that the plaintiff take nothing by its said action and that the said complaint be dismissed, and that defendants do have and recover of and from said plaintiff their costs and disbursements in said suit taxed at \$88.20, and the defendants have execution therefor, comes now into court by its counsel and prays the Court for an order allowing the said plaintiff to prosecute an appeal from the said final decree to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United

States in that behalf made and provided, and that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon said appeal, and that upon said security being given all further proceedings in this Court and the issuance of execution be suspended and stayed until the final determination of said appeal by the said United States Circuit Court of Appeals.

And your petitioner will ever pray, etc.

JOHN H. MILLER,

Solicitor and Counsel for Plaintiff. [59]

Service of the within petition for an order allowing appeal by receipt of copy admitted this 17th day of April, A. D. 1917.

SCRIVNER & HETTMAN,

For Defendants.

[Endorsed]: Filed Apr. 19, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [60]

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In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

IN EQUITY—No. 244.

SIMPLEX WINDOW COMPANY,

Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COMPANY,

Defendants.

Assignment of Errors on Appeal.

Now comes plaintiff herein, Simplex Window Company, by its counsel, and specifies and assigns the following as the errors upon which it will rely upon its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree made and entered by this Honorable Court on March 22, 1917, dismissing plaintiff's suit and awarding judgment for costs in favor of defendants, viz:

1. Error of the above-entitled court in ordering, adjudging and decreeing that plaintiff take nothing by its said action.

2. Error of the above-entitled court in ordering, adjudging and decreeing that plaintiff's complaint be dismissed.

3. Error of the above-entitled court in ordering, adjudging and decreeing that plaintiff take nothing in respect of and for the infringement of its United States letters patent No. 1,159,604, issued November 9, 1915, to Simplex Window Company.

4. Error of the above-entitled court in ordering, adjudging and decreeing that the suit be dismissed as to said United States letters patent No. 1,159,604, dated November 9th, 1915, to Simplex Window Company.

5. Error of the above-entitled court in ordering, adjudging [61] and decreeing that plaintiff take nothing in respect of and for the infringement of letters patent No. 1,072,669, issued September 9, 1913, to Simplex Window Company.

6. Error of the above-entitled court in dismissing

said suit in respect of said patent No. 1,072,669.

7. Error of the above-entitled court in failing to order, adjudge and decree that the said patent No. 1,159,604 is a good and valid patent and has been infringed by the defendants.

8. Error of the court in failing to order, adjudge and decree that the said patent No. 1,072,669 is a good and valid patent and has been infringed by the defendants.

9. Error of the above-entitled court in failing to award to plaintiff an injunction against further infringement of said letters patent No. 1,159,604.

10. Error of the above-entitled court in failing to award to the plaintiff an injunction against further infringement of said letters patent No. 1,072,669.

11. Error of the above-entitled court in failing to enter an interlocutory decree in favor of the plaintiff in the usual form, establishing the validity and prohibiting the infringement of the two letters patents in suit.

12. Error of the above-entitled court in ordering, adjudging and decreeing that the defendants have and recover of and from the plaintiff their costs and disbursements, taxed at the sum of \$88.20.

13. Error of the Court in ordering, adjudging and decreeing that defendants are entitled to any costs from the plaintiff.

NOW, THEREFORE, in order that the foregoing assignments of error may be and appear of record, plaintiff presents the same to the Court and prays that the same may be filed, and that such disposition be made thereof as is in accordance with the laws

of the United States in that behalf made and provided, [62] and plaintiff further prays that the said final decree be reversed and that the District Court of the United States for the Northern District of California be directed to enter an interlocutory decree in favor of the plaintiff and against the defendant in the usual form, adjudging the validity and infringement of the patents in suit, and enjoining any further infringement thereof, and referring the case to a Master in Chancery for an accounting of damages and profits.

All of which is respectfully submitted.

JOHN H. MILLER,

Solicitor and Counsel for Plaintiff.

Service of the within assignment of errors on appeal admitted this 17th day of April, A. D. 1917.

SCRIVNER & HETTMAN,

Atty. for Defendants.

[Endorsed]: Filed Apr. 19, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

In the Southern Division of the District Court of the United States, in and for the Northern District of California, Second Division.

No. 244—IN EQUITY.

SIMPLEX WINDOW COMPANY,

Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COMPANY
et al.,

Defendants.

Order Allowing Appeal of Plaintiff from the Final Decree.

The plaintiff having filed its petition in the above-entitled suit for an order allowing an appeal from the final decree therein, accompanied with an assignment of errors in due form,—

NOW, THEREFORE, upon motion of John H. Miller, Esq., solicitor and counsel for plaintiff, IT IS ORDERED that said petition be and the same is hereby granted, and the plaintiff is hereby allowed to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree made and entered in the above-entitled case and dated March 22, 1917, in favor of the defendants and against the plaintiff, wherein and whereby it was ordered, adjudged and decreed that the plaintiff take nothing by its action, and that plaintiff's complaint be dismissed and defendants have and recover from plaintiff their costs and disbursements in said suit taxed at the sum of \$88.20.

And it is further ORDERED that the amount of security for costs which the plaintiff shall give on said appeal be and the same is hereby fixed at the sum of Three Hundred (300) Dollars.

And it further appearing that plaintiff has prayed for a [64] supersedeas and stay of execution of said decree pending said appeal, it is further ORDERED, ADJUDGED AND DECREED that the amount of security to be furnished by plaintiff for such supersedeas and stay be and the same is hereby fixed at the sum of Two Hundred Dollars (\$200) and

that upon plaintiff's furnishing and giving a bond on appeal in the aggregate sum of Five Hundred (\$500) Dollars, conditioned as required by law, all further proceedings in this Court and the issuance of execution be and the same is hereby stayed and superseded until the final determination of said appeal by the said United States Circuit Court of Appeals.

And it is further ORDERED that upon the giving of such bond, a certified transcript of the records and proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 19th day of April, 1917.

WM. C. VAN FLEET,

Judge.

Service of the within order allowing appeal of plaintiff from final decree admitted this 17th day of April, A. D. 1917.

SCRIVNER & HETTMAN,

For Defendants.

[Endorsed]: Filed Apr. 19, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [65]

*In the Southern Division of the District Court of the
United States, in and for the Northern District
of California, Second Division.*

No. 244.

SIMPLEX WINDOW COMPANY,

Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COMPANY
et al.,

Defendants.

Stipulation Fixing Amount of Security on Appeal.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit that the amount of security for costs which the plaintiff shall give on appeal be and the same is hereby fixed at the sum of Three Hundred (300) Dollars; also that the amount of security to be furnished by plaintiff for a supersedeas and stay of execution be and the same is hereby fixed at the sum of Two Hundred (200) Dollars; and that upon the plaintiff's furnishing and giving a bond on appeal in the aggregate sum of Five Hundred (500) Dollars, conditioned as required by law, all further proceedings in this court and the issuance of execution be stayed and superseded until the final determination of said appeal by the said United States Circuit Court of Appeals.

Dated this 17 day of April, 1917.

JOHN H. MILLER,

Attorney for Plaintiff.

SCRIVNER & HETTMAN,

Attorneys for Defendants.

So ordered:

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Apr. 19, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [66]

*In the Southern Division of the District Court of the
United States, in and for the Northern District
of California, Second Division.*

No. 244—IN EQUITY.

SIMPLEX WINDOW COMPANY,

Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COMPANY
et al.,

Defendants.

Bond on Appeal by Plaintiff from Final Decree.

KNOW ALL MEN BY THESE PRESENTS:
That National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York and duly authorized and licensed to transact a suretyship business in the State of California, and to furnish bonds in the Federal courts, is held and firmly bound in the penal sum of Five Hundred (500) Dollars to be paid to the defend-

ants, Hauser Reversible Window Company, Fred Hauser and Jessie Hauser, their and each of their successors and assigns, for which payment, well and truly to be made, the National Surety Company binds itself, its successors and assigns, firmly by these presents.

The condition of the foregoing bond is such, that whereas the Simplex Window Company, plaintiff in the above suit, has taken, or is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the final decree made and entered on the 22d day of March, 1917, by the District Court of the United States for the Northern District of California, Second Division, in the above-entitled suit, in favor of the defendants and against the plaintiff, wherein and whereby it was ordered, adjudged and decreed that plaintiff take nothing by its said action and that its complaint be dismissed, that defendants have and recover from the plaintiff the costs and disbursements taxed at the sum of Eighty-eight and 20/100 (\$88.20) Dollars, and that defendants have execution therefor; [67]

NOW, THEREFORE, the condition of the above obligation is such that if the said Simplex Window Company shall prosecute its said appeal to effect and shall answer all damages and costs, if it shall fail to make its plea good, then this obligation shall be void; otherwise to remain in full force and effect.

Dated at San Francisco, California, this 18th day of April, 1917.

[Seal] NATIONAL SURETY COMPANY,

By FRANK L. GILBERT,

Attorney in Fact.

The within bond is hereby approved.

WM. C. VAN FLEET,

Judge.

State of California,

City and County of San Francisco,—ss.

On this eighteenth day of April, in the year one thousand nine hundred and seventeen, before me, John McCallan, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the National Surety Company, the corporation described in the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert acknowledged to me that he subscribed the name of the National Surety Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California. [68]

[Endorsed]: Filed Apr. 19, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

*In the Southern Division of the United States Dis-
trict Court, Northern District of California,
Second Division.*

No. 244—IN EQUITY.

THE SIMPLEX WINDOW COMPANY,
Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW COMPANY
et al.,

Defendants.

Order Allowing Withdrawal of Original Exhibits.

On motion of John H. Miller, Esq., counsel for the Simplex Window Company, plaintiff, and good cause appearing therefor, it is by the Court

ORDERED that all original exhibits offered in evidence in the above-entitled case may be withdrawn from the files of the above-entitled court and of the clerk thereof, and by said clerk be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal of the plaintiff herein to said Circuit Court of Appeals from the final decree, the said original exhibits to be returned to the files of this court upon the determination of said Appeal by said Circuit Court of Appeals.

Dated May 9th, 1917.

WM. C. VAN FLEET,
Judge.

Service of the within Order allowing the withdrawal of original exhibits admitted this — day of May, A. D. 1917.

SCRIVNER & HETTMAN,
Attys. for Defendants.

[Endorsed]: Filed May 9, 1917. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

In the Southern Division of the United States District Court, Northern District of California, Second Division.

No. 244—IN EQUITY.

THE SIMPLEX WINDOW COMPANY,
Plaintiff,

vs.

HAUSER REVERSIBLE WINDOW CO., FRED
HAUSER & JESSIE HAUSER,
Defendants.

**Certificate of Clerk U. S. District Court to
Transcript of Record on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing seventy (70) pages, numbered from 1 to 70, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the Praeceptum for Transcript of Record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United

States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$40.60; that said amount was paid by John H. Miller, Esq., attorney for plaintiff; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 31st day of May, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk. [71]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Hauser Reversible Window Company, Fred Hauser and Jessie Hauser, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Northern District of California, Second Division, wherein The Simplex Window Company is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be

corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 19th day of April, A. D. 1917.

WM. C. VAN FLEET,

United States District Judge. [72]

Service of the within Citation on Appeal admitted this 19th day of April, 1917.

SCRIVNER & HETTMAN,

Attorneys for Defendants.

[Endorsed]: No. 244. United States District Court for the Northern District of California, Second Division. The Simplex Window Company, Appellant, vs. Hauser Reversible Window Company et al., Appellees. Citation on Appeal. Filed Apr. 19, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3004. United States Circuit Court of Appeals for the Ninth Circuit. The Simplex Window Company, a Corporation, Appellant, vs. Hauser Reversible Window Company, a Corporation, Fred Hauser and Jessie Hauser, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District

Court for the Northern District of California,
Second Division.

Filed May 31, 1917.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

THE SIMPLEX WINDOW COMPANY,

Plaintiff and Appellant,

vs.

HANSEN REVERSIBLE WINDOW COMPANY
et al.,

Defendant and Appellee.

Stipulation Under Rule 23.

IT IS HEREBY STIPULATED AND AGREED
by and between the parties to the above-entitled suit,
that the following portions of the record on appeal
need not be printed as a part of the printed record,
to wit:

Defendant's exhibit file wrapper contents of Soule
and Larsen patent No. 1,159,604, being an exhibit
filed by the defendant in the court below on June 1,
1917.

IT IS FURTHER STIPULATED AND
AGREED that this stipulation shall not operate to
prevent said portions so omitted from the printed

record being used and referred to by either of the
J. H. M.
S. & H. parties on the hearing of this appeal, ~~the~~
~~same being agreeable to the court.~~

IT IS FURTHER AGREED that this Stipulation and Plaintiff's Exhibit No. 1, Soule and Larsen Patent No. 1,159,604, are to be printed as part of the record on appeal.

JOHN H. MILLER,
 Solicitor for Appellant.
 SCRIVNER & HETTMAN,
 Solicitors for Appellee.

Dated July 14th, 1917.

[Endorsed]: No. 3004. In the United States Circuit Court of Appeals for the Ninth Circuit. The Simplex Window Co., Plaintiff and Appellant, vs. Hansen Reversible Window Company et al., Defts. and Appellees. Stipulation. Filed Jul. 14, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
 the Ninth Circuit.*

No. 244—IN EQUITY.

THE SIMPLEX WINDOW COMPANY,
 Appellant,

vs.

HAUSER REVERSIBLE WINDOW COMPANY
 et al.,

Appellees.

Order Extending Time to File Record and Docket Cause.

Good cause appearing therefor;

IT IS HEREBY ORDERED, that appellant's time in which to file the record herein and docket the case with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged, and that appellant be and hereby is given thirty (30) days from date within which to do so, and the time within which to certify to said record and to file transcript thereof is extended accordingly.

Dated May 18, 1917.

WM. H. HUNT,
Judge.

[Endorsed]: No. 3004. United States Circuit Court of Appeals for the Ninth Circuit. The Simplex Window Company vs. Houser Reversible Window Company et al. Order Under Rule 16 Enlarging Time to June 17, 1917, to File Record Thereof and to Docket Case. Filed May 18, 1917. F. D. Monckton, Clerk. Refiled May 31, 1917. F. D. Monckton, Clerk.

**Plaintiff's Exhibit No. 1—Soule and Larsen Patent
No. 1,159,604.**

No. 1,159,604.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come:

WHEREAS, ARTHUR C. SOULE and LOUIS A. LARSEN, of San Francisco, California, have presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in

WINDOWS,

They having assigned their right, title, and interest in said improvement, by mesne assignments, to The Simplex Window Company, of San Francisco, California, a corporation of California, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and have complied with the various requirements of Law in such cases made and provided, and

WHEREAS, upon due examination made the said Claimants are adjudged to be justly entitled to a patent under the Law.

Now, therefore, these Letters Patent are to grant unto the said The Simplex Window Company, its successors or assigns for the term of Seventeen years from the ninth day of November, one thousand nine hundred and fifteen, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this ninth day of November, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States of America the one hundred and fortieth.

[Seal]

J. T. NEWTON,
Acting Commissioner of Patents.

A C SOULE & L A LARSEN

WINDOW

APPLICATION FILED OCT 31 1911

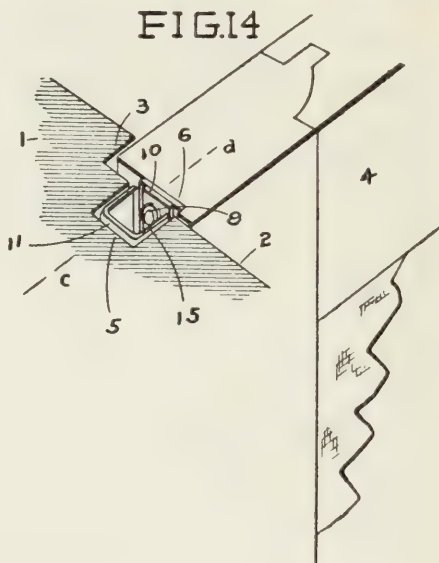
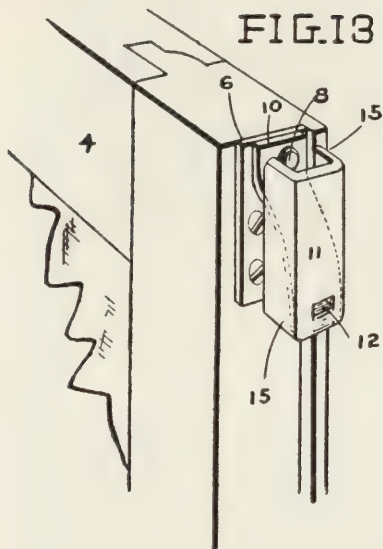
1,159,604.

Patented Nov. 9, 1915

3 SHEETS—SHEET 3

FIG. 13

FIG. 14



• FIG. 15

FIG. 16

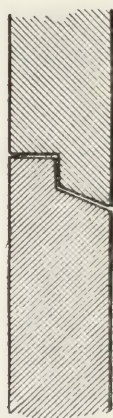
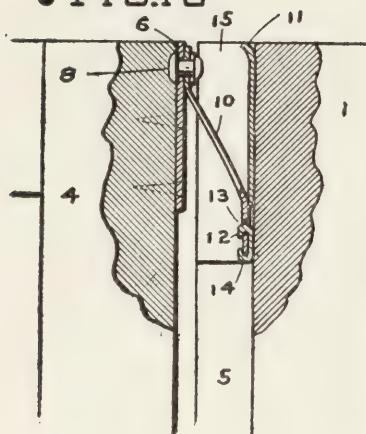
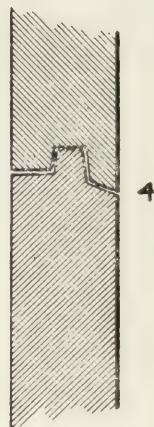


FIG. 17



WITNESSES

H. Montague Hall,
B. B. Chester

INVENTORS
A. C. SOULE
L. A. LARSEN
for A. S. Paré
ATTORNEY

A. C. SOULE & L. A. LARSEN.

WINDOW.

APPLICATION FILED OCT. 31, 1911.

1,159,604.

Patented Nov. 9, 1915.

3 SHEETS—SHEET 2.

FIG. 8

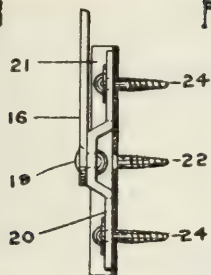


FIG. 9

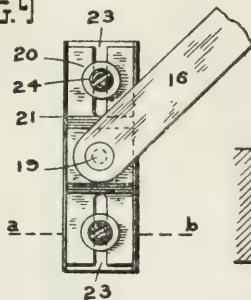


FIG. 10

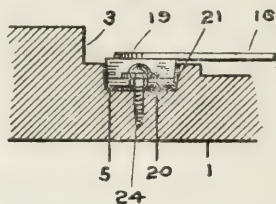


FIG. 11

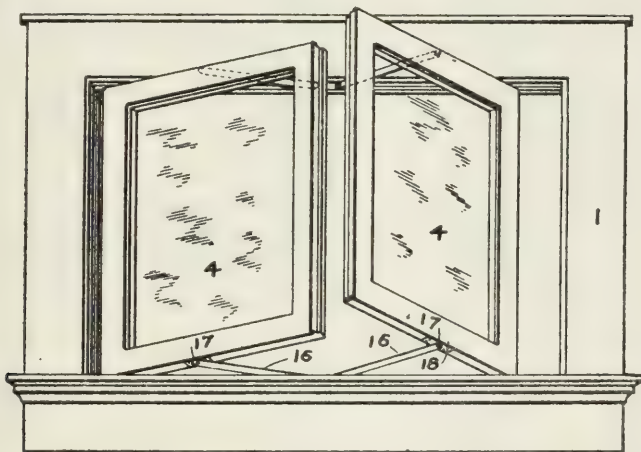
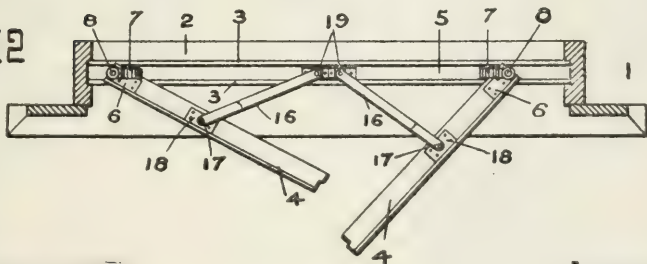


FIG. 12



WITNESSES

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WINDOW.

APPLICATION FILED OCT. 31, 1911.

1,159,604.

Patented Nov. 9, 1915.

3 SHEETS—SHEET 1.

FIG. 2

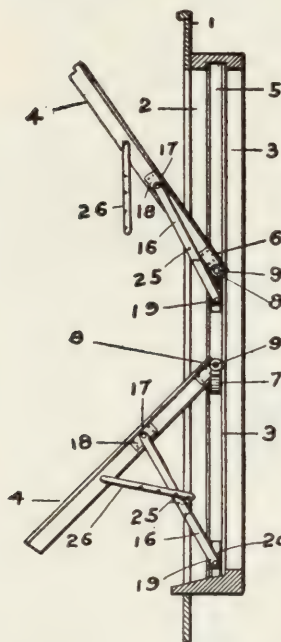


FIG. 1

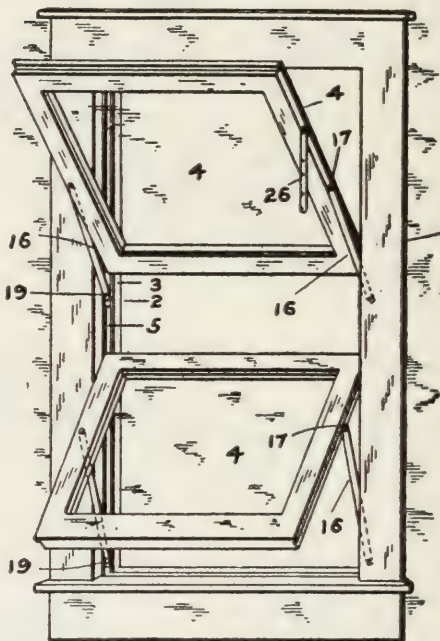


FIG. 3

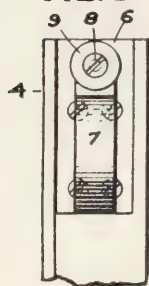


FIG. 4

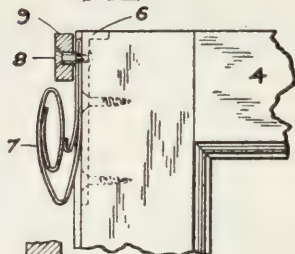


FIG. 6

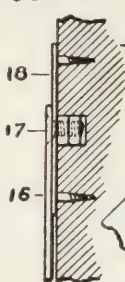


FIG. 7

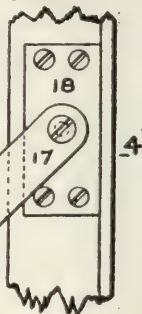
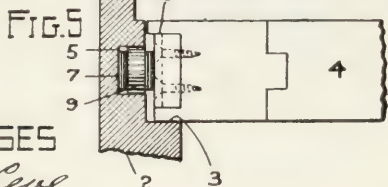


FIG. 5



WITNESSES

M. S. Leav
B. C. Chester

INVENTORS

A. C. SOULE
L. A. LARSEN
per A. S. Fare
ATTORNEY

UNITED STATES PATENT OFFICE.

ARTHUR C. SOULE AND LOUIS A. LARSEN, OF SAN FRANCISCO, CALIFORNIA,
ASSIGNORS, BY MESNE ASSIGNMENTS, TO THE SIMPLEX WINDOW COM-
PANY, OF SAN FRANCISCO, CALIFORNIA, A CORPORATION OF CALIFORNIA.

WINDOW.

1,159,604.

Specification of Letters Patent.

Patented Nov. 9, 1915.

Application filed October 31, 1911. Serial No. 657,784.

To all whom it may concern:

Be it known that we, ARTHUR C. SOULE and LOUIS A. LARSEN, citizens of the United States, residing in the city and county of San Francisco, State of California, have invented certain new and useful Improvements in Windows, whereof the following is a specification.

Our invention relates in general way to windows, and especially to swinging windows which move entirely to one side or the other of a supporting frame as opposed to centrally pivoted windows, which, when opened, lie with their sashes on both sides of the frame.

Centrally pivoted windows have the upper and lower parts of their sashes acting as counterweights to each other, and are practically balanced in any position; but windows which swing from one of their edges are counter-weighted; or fixed in position by adjusting means or devices which require to be moved and operated by hand or otherwise and through which the sashes moved.

It is also characteristic of windows hinged on their edges that only one face is turned inwardly, which makes washing of the outside thereof a difficult matter. Furthermore vertically sliding windows hung usually by counterweights move in one direction and thereby open one-half of the space in which they operate.

It is our object to provide a novel window in which the sash swings entirely to one side of the frame, and which requires no counterweights or mechanism to give it stability in any position desired, and in which the sash may be turned with either face inward or outward.

A further object of our invention is to provide simple and effective means for hanging, operating and controlling the movements of the sashes and to increase the opening space in operation.

With these and other objects in view, the nature of which will appear in the following specification, our invention consists in a grooved window-frame, in which friction guides are slidably secured and support the sash in pivoted position near its upper ends, and carrier arms, one end of which is pivotally secured to the side of said sash, near its vertical center, while the other end is pivoted to the side of the window frame.

The invention further consists in providing window frames with a sill and jambs designed to receive a sash and form therewith a water tight joint by providing the jambs with a rabbet and the side walls of the rabbet provide a stop for the sash when the same is in a closed position.

It also further consists in the novel combinations, parts and arrangements, explained in the following description, and particularly pointed out in the claims at the end hereof, and illustrated in the accompanying three sheets of drawings, in which,

Figure 1, is a perspective view of a window-frame and the sashes therein in open position, looking from the outer side thereof, constructed and arranged in accordance with our invention. Fig. 2, is a side elevation of Fig. 1, the window-frame being in cross section. Fig. 3, is a front elevation of one form of our friction-guides as applied to the upper edge of a sash by which the same is supported in pivoted position in the window-frame. Fig. 4, is a side elevation of Fig. 3. Fig. 5, is a plan view of Fig. 4 showing the window-frame in cross section. Fig. 6, is a side elevation of a portion of our pivoted carrier arm, at the point connected to the sash which is shown in vertical section. Fig. 7, is a front elevation of the parts shown in Fig. 6. Fig. 8, is a side elevation of a detached portion of our pivoted carrier-arm and its adjacent parts at the point connected to the window-frame. Fig. 9, is a front elevation of the parts shown in Fig. 8. Fig. 10, is a cross sectional view of Fig. 9, taken on dotted line *a, b*, showing also a broken portion of the window-frame. Fig. 11, is a perspective view of our window, looking from the outer side thereof and showing the sashes disposed to swing horizontally. Fig. 12, is a plan view of our window-frame horizontally disposed, with the top thereof cut away and the sashes therein in open position. Fig. 13, is a perspective view of the upper outer edge corner of a sash showing a modified form of the friction-guide and spring connection pivoted to the stile thereof. Fig. 14, is a perspective view of the parts shown in Fig. 13 also showing a broken cross section of the window-frame. Fig. 15, is a vertical elevation taken from line *c, d* of Fig. 14, showing the arrangement and connection of the

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friction-guides and their adjacent parts. Fig. 16, is a cross sectional view showing the meeting longitudinal edges of an upper and lower sash formed into a lapping joint and, 5 Fig. 17, is a similar view showing the meeting edges formed into a tongue and groove joint.

The same symbol of reference marks the same part in whichever view it may appear. 10 pear.

Referring to the drawings, the frame 1 is provided with side jambs 2 having the rabbet 3 formed therein, the side wall surrounding said rabbet 3 adapted to form a suitable 15 seat and weather strip for the sash when the same is in a closed position.

Within the side jambs is groove 5 which may be lined with metallic strips or casing (not shown) to improve the wearing efficiency and adapted to receive therein a slidable friction guide by which the sash 4 is pivotally supported within the window-frame in any position desired. 20

The friction-guide just mentioned is 25 shown in detail in Figs. 3, 4, and 5 and in modified form in Figs. 13, 14, and 15. In the first form it comprises a plate 6 which may be secured to the outer upper edges of the sash by means of screws or other suitable method of fastening and to said plate is pivotally secured a spring 7, of an elliptic shape adapted to slide in the grooves 5 and support therein the sash in whatever position the same may be adjusted by the 35 spring pressure between the plates 6 and the frame.

At the pivot point 8 of the spring 7 is an anti-friction wheel 9 which also enters and slides in the groove 5 and acts together 40 with the spring 7 to slidably secure the sash in position within its casing. These features are shown in Figs. 3, 4, and 5.

Referring now to the modified form of the friction-guide shown in Figs. 13, 14 45 and 15, the plate 6 is secured to the sash in the manner above described, and the spring 10 therein shown is pivotally secured at one end to said plate as at 8, while its other end is rigidly fastened to a bearing plate 11 by means of tongue 12 punched out therefrom and passing through a hole 13 in the spring and bent over the edge thereof and the downward projecting end 14 of the bearing plate 11 is bent over the 55 end of the spring thus locking the same rigidly in position as shown in Fig. 15. The bearing plate just mentioned is provided with side flanges 15 slidably adjusted in the grooves 5 so that pressure from the 60 spring 10 is exerted between plate 6 and the bearing plate 11 for every possible position of the sash and the ends of the flanges 15 together with the ends of bearing plate 11 are slightly bent inwardly to facilitate 65 the sliding movements in the grooves.

The sash is rabbeted along the outer vertical face of its stiles to receive and partially inclose the friction-guide and the carrier-arm 16 which lies between the jambs and the sash when the window is closed. 70 The carrier-arm just mentioned is pivotally secured at one of its ends as at 17 to a wearing plate 18 which is secured to the rabbeted portion of the stiles close to the vertical center thereof as shown in Figs. 1, 2, 75 1, and 12 and more particularly Figs. 6 and 7. This method of pivoting and securing that portion of the carrier-arm to the sash, constitutes an efficient fastening means and at the same time the other end of the 80 carrier-arm 16 is pivoted in the groove 5, of the side jambs 2 as at 19 by means of plate 20 adjustably mounted in casing 21 which is adapted to fit in the groove 5 and is secured therein by means of the screw 22 85 as shown particularly in Figs. 8, 9, and 10.

The ends of plate 20 are provided with slots 23 to permit such adjustments in the casing 21 as may be necessary while setting 90 up the sash permanently in position and which is accomplished by means of screws 24 engaging the slots 23 and passing through the bottom part of the casings and screwed to the window-frame thus securing the 95 plates in position.

The middle portion of the plate 20 forms the pivot point 19 of carrier-arm 16 which is raised above the edges of the groove 5 so that the carrier-arm can move freely 100 while opening or closing the sash.

When the window is open as shown in Figs. 1 and 2, the portion of the sash between the points 17 and 8, the portion of the frame, between the points 8 and 19 and the carrier-arm 16 form a triangle in which 105 the lengths of two of the sides, to wit, the side 17—19 and the side 17—8, are fixed and in which the point 17 forms the vertex and point 19 is fixed. The point 8 by this construction always lies in the plane of the 110 jamb. As the window opens and closes the altitude of the triangle aforesaid varies; for which reason, there being two sides of the triangle fixed in length, the third side must vary in correspondence with the 115 change of altitude. It is part of the function of the friction-guide to vary the third side by sliding in the groove 5.

By the described construction, the sash 4 swings entirely to one side of the frame; 120 and by the frictional activity of the friction-guide and the supporting action of the arm 16, the sash is stably fixed in any position desired, without counterweight.

Describing now the arrangement whereby 125 either face of the glass may be turned inwardly, the desired result is obtained by making the distance between point 17 and the point 8 shorter than the distance between the points 17 and 19, whereby the 130

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friction-guide may slide past the position in which the plane of the sash forms a right angle with the jamb, into a position where it forms an obtuse angle with the portion 5 of the frame included between the point 8 and the point 19. Such a position is illustrated in Figs. 1 and 2 by the upper sash.

The drawings illustrate a double sashed window, the edges thereof being rabbeted; and 10 the jointing edges of the two sashes are rabbeted to fit each other or form into lap-joint as shown in Fig. 16 or tongue and groove as in Fig. 17. Of course where only one sash is used both the upper and lower sash rails 15 are formed to fit the lintel and sill. Such construction is shown at the upper edge of the upper sash and the lower edge of the lower sash, in Fig. 2.

The closed sash may be locked by any 20 suitable means (not shown in the drawing). In the open position two states are disclosed, one, which may be called the normal is shown by the lower sash, and the other abnormal, shown by the upper sash, and only 25 used when it is desired to clean the outside surface of the glass. The open window may be locked in the normal position of the sash if desired by means of the pin 25 on carrier-arm 16 and the notched arm 26, pivoted to 30 the sash as particularly shown in Fig. 2.

Referring now to Figs. 11 and 12, they are presented to show our window disposed so the sash may swing in horizontal instead of vertical arcs. The lintel and sill are provided with grooves, instead of the side 35 jambs, as in Figs. 1 and 2; and the friction-guides slide horizontally instead of verti-

cally. Therefore in reading the above description as applied to our horizontally disposed window, it is only necessary to change 40 the terms jamb, lintel and sill in an obvious way, to render Figs. 11 and 12 clearly comprehensible.

Having described our invention what we claim as new and desire to secure by Letters Patent of the United States, modification 45 within the scope of the claims being expressly reserved, is:

1. In combination with a window frame having grooves therein, a sash adapted to 50 operate in said frame, carrier arms adapted to support the central portion of the sash, an arm connected to the sash, the said arm adapted to engage the carrier arms and lock the sash in an open position. 55

2. In combination with a window frame having grooves therein, a sash adapted to operate in said frame, carrier arms adapted to support the central portion of the sash, each of the arms having lugs projecting 60 from the side thereof, an arm having notches, said arm being connected to the sash, the said notches in the arm adapted to receive the respective lugs on the carrier arms, and lock the sash in an open position. 65

In testimony that we claim the foregoing we have hereto set our hands in the presence of witnesses, this 26th. day of Oct. 1911.

ARTHUR C. SOULE.
LOUIS A. LARSEN.

Witnesses:

BLANCHE CHESTER,
K. MONTAGUE HALL.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

[Endorsed]: No. 244. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 1. Filed Jan. 29, 1917. W. B. Maling, Clerk.

No. 3004. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 1. Filed Jun. 1, 1917. F. D. Monckton, Clerk.

**Plaintiff's Exhibit No. 2—Soule Patent No.
1,072,669.**

No. 1,072,669.

THE UNITED STATES OF AMERICA.

To All to Whom These Presents Shall Come:

WHEREAS, ARTHUR C. SOULE, of San Francisco, California, has presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in

WINDOWS,

He having assigned his right, title, and interest in said improvement, by mesne assignments, to The Simplex Window Company, of San Francisco, California, a corporation of California, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of Law in such cases made and provided, and

WHEREAS, upon due examination made the said Claimant is adjudged to be justly entitled to a Patent under the Law.

Now, therefore, these Letters Patent are to grant unto the said The Simplex Window Company, its successors or assigns for the term of Seventeen years from the ninth day of September, one thousand nine hundred and thirteen, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office

to be affixed at the City of Washington, this ninth day of September, in the year of our Lord one thousand nine hundred and thirteen, and of the Independence of the United States of America the one hundred and thirty-eighth.

[Seal]

R. T. FRAZIER,
Acting Commissioner of Patents.

A. C. SOULE.

WINDOW

APPLICATION FILED AUG. 21, 1913

Patented Sept. 9, 1913.

2 SHEETS-SHEET 2.

1,072,669.

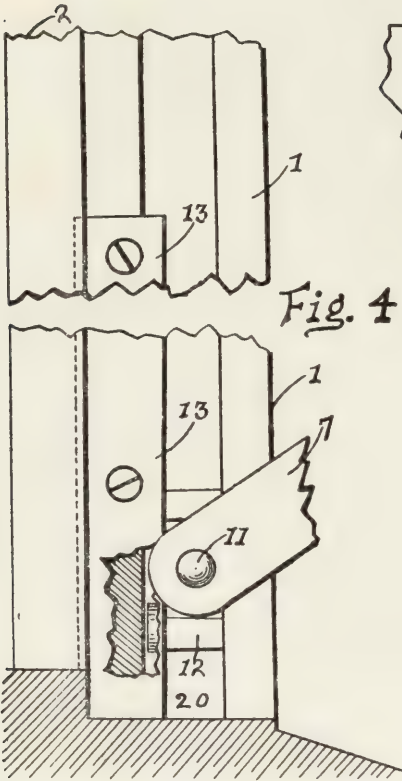


Fig. 4

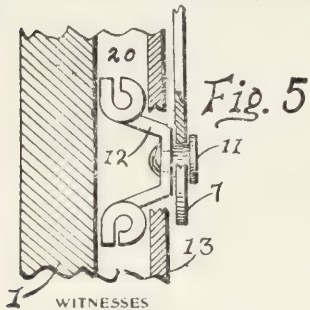


Fig. 5

WITNESSES

M. A. Miller
Emily Wilder

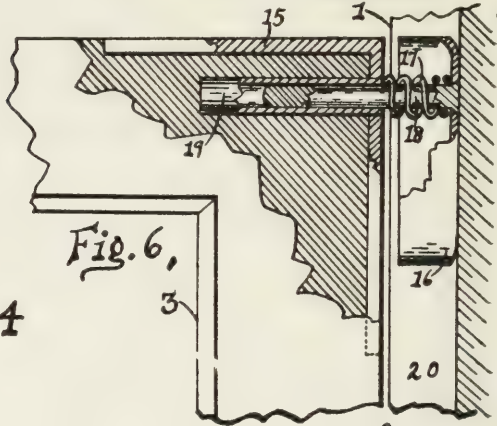


Fig. 6,

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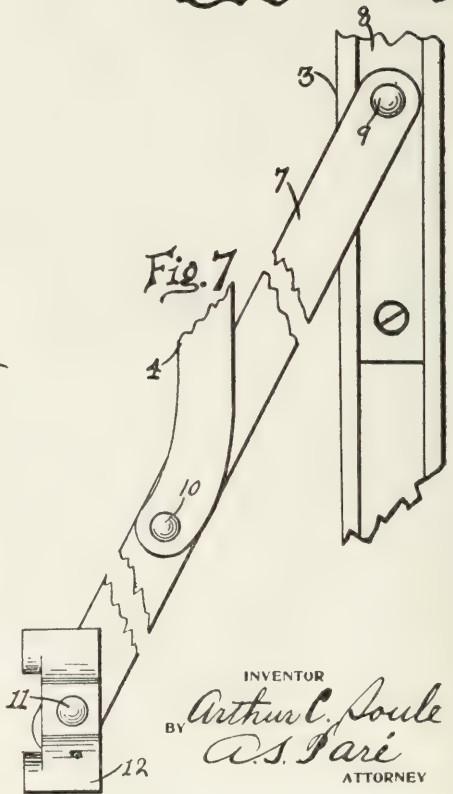


Fig. 7

INVENTOR
BY Arthur C. Soule
A. S. Pare
ATTORNEY

A. C. SOULE.

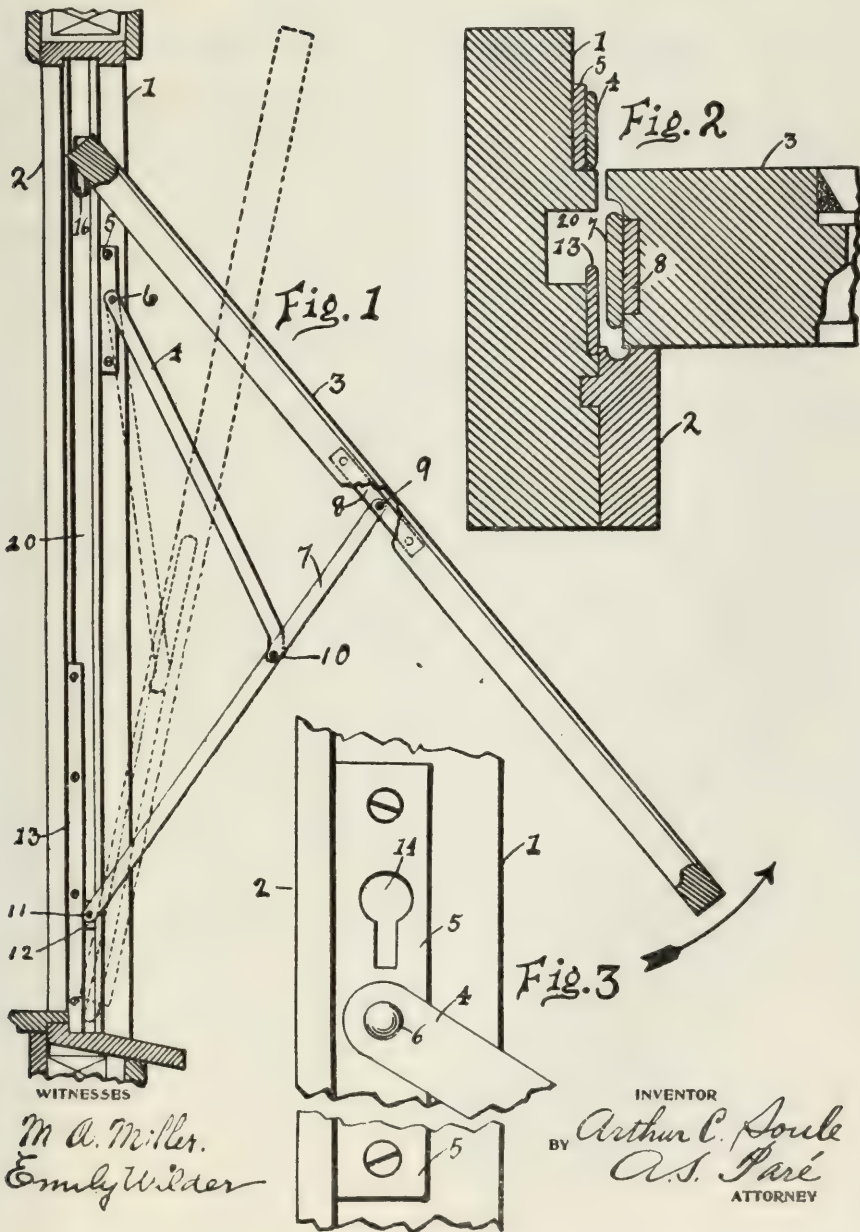
WINDOW

APPLICATION FILED AUG 21, 1912.

Patented Sept. 9, 1913.

2 SHEETS-SHEET 1.

1,072,669.



UNITED STATES PATENT OFFICE.

ARTHUR C. SOULE, OF SAN FRANCISCO, CALIFORNIA, ASSIGNOR, BY MESNE ASSIGNMENTS, TO THE SIMPLEX WINDOW COMPANY, OF SAN FRANCISCO, CALIFORNIA, A CORPORATION OF CALIFORNIA.

WINDOW.

1,072,669.

Specification of Letters Patent.

Patented Sept. 9, 1913.

Application filed August 21, 1912. Serial No. 716,197.

To all whom it may concern:

Be it known that I, ARTHUR C. SOULE, a citizen of the United States, residing in the city and county of San Francisco, State of California, have invented certain new and useful Improvements in Windows, whereof the following is a specification.

My invention relates to windows, and especially to windows of the swinging reversible sash type; and it has for its object to provide a new and improved window of the character specified which, while remaining in a state of stable equilibrium in whatever position it may be placed, may readily be moved from any position to any other.

With this object in view my invention consists in a sash slidably pivoted in a window frame, adjuster arms having one end fixedly pivoted in and slightly above the middle points of the stiles and the other end slidably pivoted in the frame; and carrier arms having one end fixedly pivoted in the frame, and the other end fixedly pivoted to the adjuster arms.

It also consists in the combination with a frame, sash, adjuster arm, and carrier arm of a plate having means for automatically adjusting its position on the frame.

It also consists in the novel parts, combinations, and arrangements, set forth in the following description, particularly pointed out in the claims, and illustrated in the accompanying two sheets of drawings, of which—

Figure 1 is a side elevation of my invention, partly in section, showing the frame, sash, one adjuster arm, and one carrier arm, their attachments and mutual relations, also showing in dotted lines the window as it appears in reversed position. Fig. 2 is an enlarged cross section of Fig. 1 as it appears when the window is closed; Fig. 3 is a detail view of the upper wearing plate of the carrier arm, and adjacent parts, showing the means for automatically adjusting said plate; Fig. 4 is a detail view of the lower end of the adjuster arm, its means of attachment to its sliding fixture, and of the adjacent parts, showing the retaining stop; Fig. 5 is a further detail of the sliding fixtures of the adjuster arm showing an edge view of the same in relation to a vertical section of the frame; Fig. 6, is a detail view of the pivot shoe, and the pivoted attachment of

the sash thereto; and Fig. 7 is a broken detail of the adjuster arm, part of the carrier arm connected therewith, the upper wearing plate of the adjuster arm, and an elevation of the sliding fixture attached to the lower end of the adjuster arm.

The same symbol of reference marks the same part in whichever view said part may appear.

Describing my invention in detail, and referring again to the drawing, 1 is the side window jamb, 2 is the stop, and 3 is the sash. Up and down the frame on both jambs of the window run grooves 20, and shoes 16 are slidably located therein, as are also sliding fixtures 12. To shoes 16 the sash at its upper end is pivoted, the detailed arrangement being shown in Fig. 6, where 15 is a pivot shoe plate, 18 a stem supporting the pivot shoe, said stem being surrounded by a sleeve or casing 19, fixed in a hole in the sash, and having a spring 17 which tends to press the shoe against the side of the groove 20.

By the above mentioned means the sash is slidably pivoted in the frame—but so far as described the sash has but one position of stable equilibrium, which is the closed position of the window. It is given stable equilibrium in other positions by the adjuster arms 7, which have one end fixedly pivoted to points in the stiles of the sash. The best location of these points is near the middle of the stile, being about two inches above said middle points. One end of the arm is pivotally attached by pivot 9 to wearing plates 8 which are screwed to the sash; and the other ends are pivoted by pivot 11 to the sliding fixtures 12, which are located in the grooves 20, and slide therein. The details of the sliding fixtures are shown in Figs. 4, 5, and 7, and are so arranged as to be held in the slot by the retaining stop 13, which extends from the bottom of the frame to about the point shown in Fig. 1. For further securing the general equilibrium desired, and for allowing the window to be readily shifted from one position to another, I provide carrier arms 4, one end of which is pivoted to the corresponding adjuster arm 7 by pivot 10 at a point about one third the length of said arm measured from the pivot 9. The other end of carrier arm 4 is pivoted to the frame by

1,072,669

means of the pivot 6 in wearing plate 5, which is set in the jamb by screws, its location being determined by means of the adjusting slot 14. The approximate location is first determined, and the plate loosely set in place by means of a screw not shown in said adjusting slot. The sash is then moved to proper position within its frame, the plate sliding about said screw until its proper location is disclosed. It is then fastened by permanent screws as shown. The lower part of carrier arm 4 is curved as shown in the drawing (Figs. 1 and 7). The reason for curving the end is to allow the window to close, the position of the pivot 10 being then at a point to the left of the pivot 6, and directly above pivot 11.

The window described possesses among its other novelties and utilities the quality of being fully reversible, as indicated by the arrow and the dotted lines in Fig. 1, which show the arms falling into their reversed positions.

Having described my invention and believing that I have produced novel and useful improvements in the class to which the same appertains, what I claim as new and desire to secure by Letters Patent of the United States, is:

1. A window comprising a frame, a sash slidably pivoted in said frame, adjuster arms, one end of which being fixedly pivoted at points slightly above the middle of the sash stiles, and the other end slidably pivoted in the frame, and carrier arms one end of which is fixedly pivoted in the frame and the other end fixedly pivoted to the corresponding adjuster arm.

2. A window comprising a frame longitudinally grooved in both jambs, shoes slidable in said grooves, a sash pivoted at its upper edge to said shoes, sliding fixtures in said grooves, adjuster arms fixedly pivoted at one end to said sash at points slightly above the middle points of the stiles of said sash and at the other end pivoted to said sliding fixtures; and carrier arms fixedly pivoted at one end to the frame and at the other end fixedly pivoted to the corresponding adjuster arm.

3. A window comprising a frame longitudinally grooved in both jambs, shoes slidable in said grooves, a sash pivoted at its upper edge to said shoes, sliding fixtures in

said grooves, adjuster arms fixedly pivoted at one end to said sash at points slightly above the middle points of the stiles of said sash and at the other end pivoted to said sliding fixtures; adjustable wearing plates on said frame, and carrier arms fixedly pivoted at one end to said adjustable plates and at the other end fixedly pivoted to the corresponding adjuster arm.

4. A window comprising a frame, a sash in said frame, an adjuster arm pivotedly secured at one end to said frame and at the other end to said sash and a carrier arm pivotally secured at one end to said frame and at the other end to said adjuster arm.

5. A window comprising a frame, a sash in said frame, an adjuster arm slidably pivoted in the frame and fixedly pivoted in the sash and a carrier arm fixedly pivoted in the frame and to said adjuster arm.

6. A window comprising a frame, a sash mounted in said frame, an adjuster arm slidably pivoted at one end to the frame and fixedly pivoted at the other end to the sash and a carrier arm fixedly pivoted at one end to said frame and at the other end to said adjuster arm.

7. A reversible window comprising a sash, an adjuster arm of suitable length, a carrier arm supporting said adjuster arm and window sash, a slidable pivoted connection between said frame and one end of said adjuster arm, and a pivoted connection between the other end of said adjuster arm and points near the middle of the sash-stiles about which said sash is rotatable.

8. A window comprising a frame having a grooved jamb, shoes slidable in said groove, a sash pivoted to said shoes, a pressure spring between said shoe and sash, a sliding fixture in said groove, an adjuster arm fixedly pivoted at one end to said sash and at the other end pivoted to said sliding fixture; and a carrier arm fixedly pivoted at one end to the frame and at the other end fixedly pivoted to the adjuster arm.

In testimony whereof I claim the foregoing I have hereto set my hand in the presence of two witnesses, this 16th day of August, 1912.

ARTHUR C. SOULE.

Witnesses:

M. A. MILLER,
A. J. HENRY.

[Endorsed]: U. S. of America. Letters Patent #1,072,669.

No. 244. U. S. Dist. Court, Nor. Dist. Calif. Plff. Exhibit 2. Filed Jan. 29, 1917. W. B. Maling, Clerk.

No. 3004. U. S. Circuit Court of Appeals for the Ninth Circuit. Plaintiff's Exhibit 2. Filed Jun. 1, 1917. F. D. Monckton, Clerk.

Defendants' Exhibit "A"—Hauser Patent No.

1,114,260.

F. HAUSER.

WINDOW.

APPLICATION FILED JAN. 6, 1914

1,114,260.

Patented Oct. 20, 1914.

FIG. 1

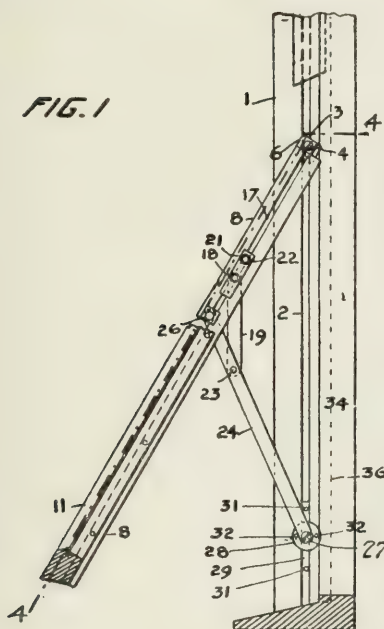


FIG. 2

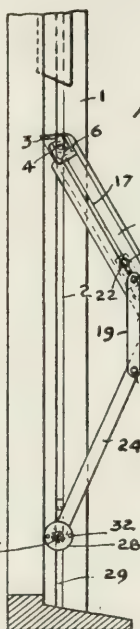


FIG. 3

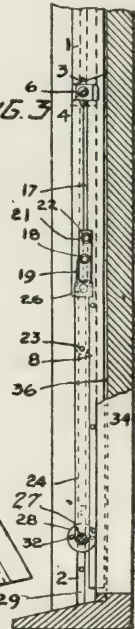


FIG. 4

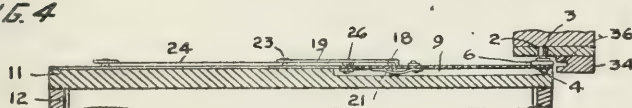


FIG. 5

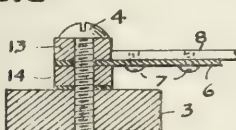


FIG. 6

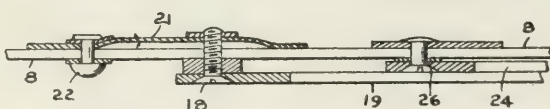
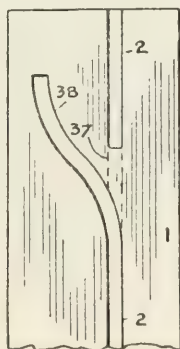


FIG. 7



WITNESSES

G. M. Bell
Lombard

INVENTOR,
FREDERICK HAUSER

By F. M. Wright
ATTORNEY

UNITED STATES PATENT OFFICE.

FREDERICK HAUSER, OF SAN FRANCISCO, CALIFORNIA.

WINDOW.

1,114,260.

Specification of Letters Patent.

Patented Oct. 20, 1914.

Application filed January 6, 1914. Serial No. 810,543.

To all whom it may concern:

Be it known that I, FREDERICK HAUSER, a citizen of the United States residing at San Francisco, in the county of San Francisco and State of California, have invented new and useful Improvements in Windows, of which the following is a specification.

One object of the present invention is to provide means for so securing window sashes in window frames that they can be swung horizontally and reversed to permit both sides of the sash to be readily cleaned from the inside of the room.

A further object is to provide such fastening means which will be simple and inexpensive, and which can be readily secured in place by a carpenter having no special skill or experience.

A further object is to provide such fastening means which can readily be adapted to the usual slidable window sashes, to convert them into swinging reversible sashes.

In the accompanying drawing, Figure 1 is a vertical section of a window, the lower sash being open; Fig. 2 is a similar view looking from the side opposite to that in Fig. 1; Fig. 3 is a vertical section of the window, both sashes being closed; Fig. 4 is a section on the line 4—4 of Fig. 1; Fig. 5 is an enlarged section, showing the connection of a sash with a slidable block; Fig. 6 is a longitudinal section through a slotted plate; Fig. 7 is a broken side view of a modified form of window frame member.

Referring to the drawing, 1 indicates the pulley stile of an ordinary window frame of which the parting bead has been removed from the groove 2 thereof. In the groove 2 of each pulley stile can slide a metal block 3 having preferably rounded or tapering ends. Into a threaded hole in said block is screwed a screw 4, which passes through a plate 6, secured by screws 7 to a flat bar 8, the head of said screw being received in the top of a groove 9 in the outer surface of the adjacent side rail 11 of the window sash 12, and being held against movement through said plate 6 by lock nuts 13, 14, one on each side of said plate 6. By removing the slide blocks from the grooves 2 and screwing or unscrewing said slide blocks upon the screws 4 the sash may be made tighter or looser within the frame, as required. Said bar 8 is secured by screws 16 in a recess or mortised portion of the side rail, 11 of the sash, and its upper portion is preferably wider than

its lower, and has a long slot 17 in which can slide a screw 18, passing through an end of a link 19, the inner end of the screw 18 being riveted to a bow spring 21, near one end, the other end of the spring having a rivet 22 passing therethrough and also through the slot 17 to form a guide. The ends of said spring 21 bear against the under side of the flat bar 8 and create sufficient friction thereagainst, to prevent the window sash moving from any position to which it has been turned. The other end of said link is pivoted, as shown at 23, to a mediate point of an arm 24, of which one end is pivoted, as shown at 26, to the lower end of the slotted portion of the bar 8. Through the lower end of said arm passes a screw 27, which also passes through a plate 28, and is then screwed into a stationary block 29 in the groove 2, and is also screwed into the pulley stile 1 at the bottom of said groove 2. Said block is additionally secured by screws 31 extending through holes in its ends and screwed into said pulley stile at the bottom of said groove. Said plate 28 is also secured by screws 32 to said pulley stile on opposite sides of said groove. By this construction it results that if there is sufficient friction caused by frictional engagement of the spring 18 with the slotted bar 8, said window sash will remain in any position to which it has been opened, notwithstanding that there is no direct support for said window sash. It is also evident that the top of the window sash can be lowered to a point not much higher than the pivots or screws 27, the bottom of the window sash then extending upwardly to a much greater height than the top, so that the window sash is almost entirely reversed and thus can be readily cleaned from the inside.

The inner edge of the slotted plate or bar 8 extends slightly inward, beyond the inner face of the sash rail, and I provide an inner stop 34 for said sash rail having in its outer face a groove 36 to receive said inwardly projecting edge of the slotted bar 8. Said bar, extending inwardly into said grooved portion of the window stop, forms a very complete closure for excluding moisture and drafts from the interior of the room.

In the preferred form of my invention, that is, when making an entirely new window in accordance with my invention, I place one sash immediately over the other, and in that case the grooves 2 extend from

1,114,260

top to bottom of the window in a straight line. But when it is desired to reconstruct in accordance with my invention a window of the old style, in which the lower sash is not immediately below the upper sash, I may block up, as shown at 37 in Fig. 7, the grooves 2 opposite the juncture of the upper and lower sash, and then continue, as shown at 38, the lower part of said grooves 2 in a direction curved inwardly and upwardly, thus allowing the top of the lower sash, when in its closed position, to be at the inner side of the bottom of the upper sash. In this case, the pivots 27 for the arms 24 will not be in the grooves 2, but to the inner side thereof, so that the lower part of said grooves 2 will be visible from the outside of the window.

I claim:—

1. A reversible window having a longitudinally grooved side frame member, a sash having a longitudinally grooved part adjacent to the side frame member, a block pivoted thereto and slidable in the first-named groove, an arm pivoted at one end to said member, an element frictionally slidable in said second-named groove, and a link piv-

otally connected at its ends to said slidable element and arm respectively.

2. A reversible window having a longitudinally grooved side frame member, a sash, a block pivoted to said sash and slidable in said first-named groove, an arm pivoted at one end to said member, and a link pivoted to one of said elements, the sash and arm, and having a frictional slidable engagement with the other element.

3. A reversible window having longitudinally grooved side frame members, a sash having longitudinally grooved parts adjacent to the side frame members, blocks pivoted thereto and slidable in the first-named grooves, arms each pivoted at one end to said members, elements frictionally slidable in said second-named grooves, and links pivotally connected at their ends to said slidable elements and arms respectively.

In testimony whereof I have hereunto set my hand in the presence of two subscribing witnesses.

FREDERICK HAUSER.

Witnesses:

FRANCIS M. WRIGHT,
D. B. RICHARDS.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

[Endorsed]: No. 244. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "A." Filed Feb. 2, '17. W. B. Maling, Clerk.

No. 3004. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "A." Filed June 1, 1917. F. D. Monekton, Clerk.

Defendants' Exhibit "B"—Frotscher Patent No.
509,521.

(No Model.)

2 Sheets—Sheet 1.

O. FROTSCHER.
WINDOW.

No. 509,521

Patented Nov. 28, 1893.

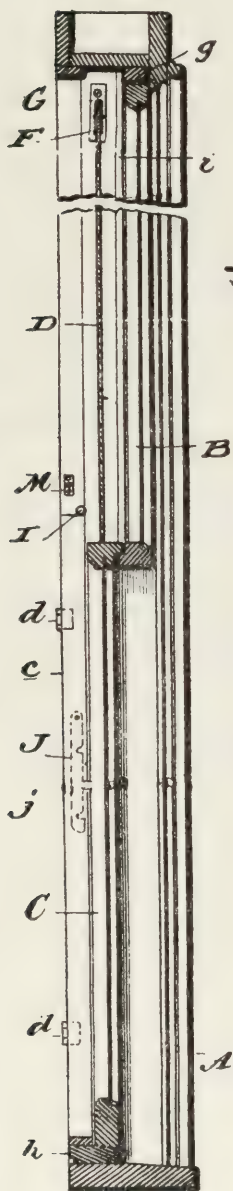


Fig. 1.

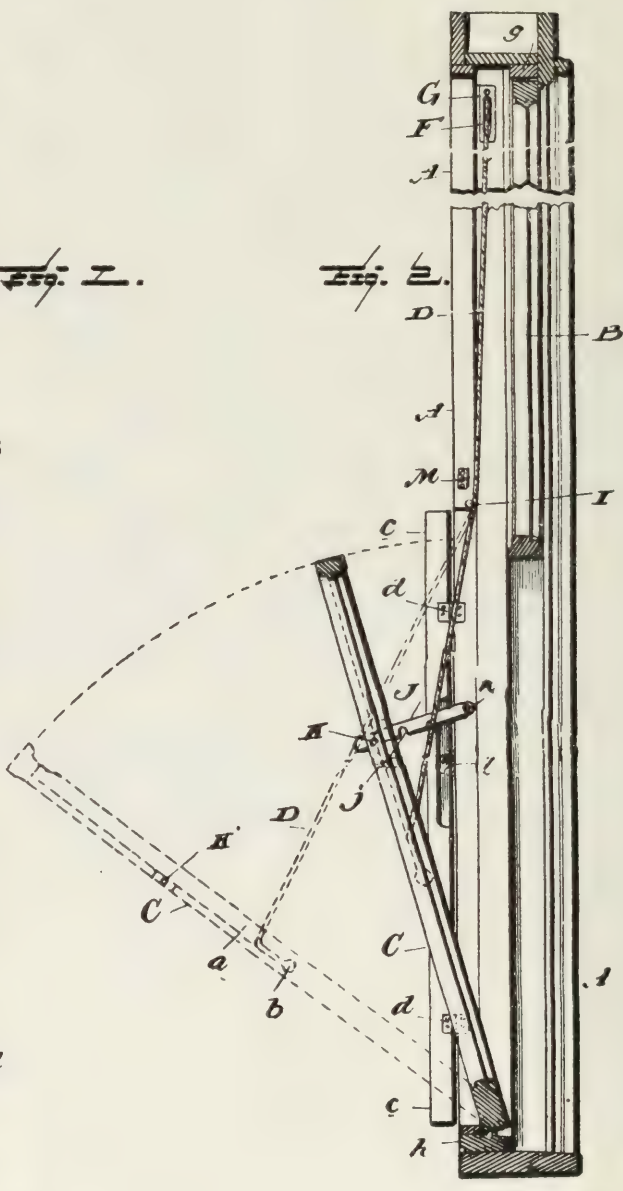


Fig. 2.

Witnesses

L. C. Mills.
Thos E Robertson

Inventor

Oscar Frotscher
By J. H. Robertson
Attorney

(No Model.)

2 Sheets—Sheet 2.

O. FROTSCHER.
WINDOW.

No. 509,521.

Patented Nov. 28, 1893.

Fig. 1.

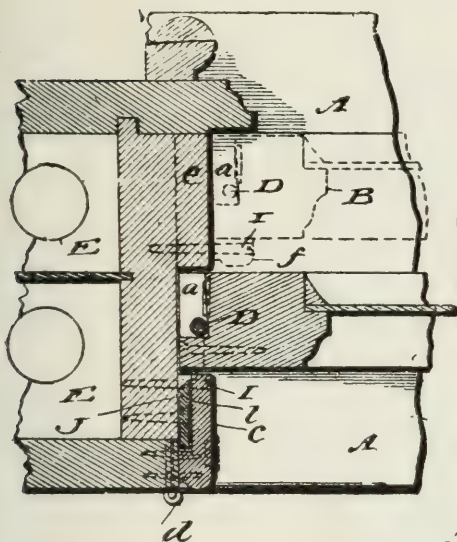


Fig. 3.

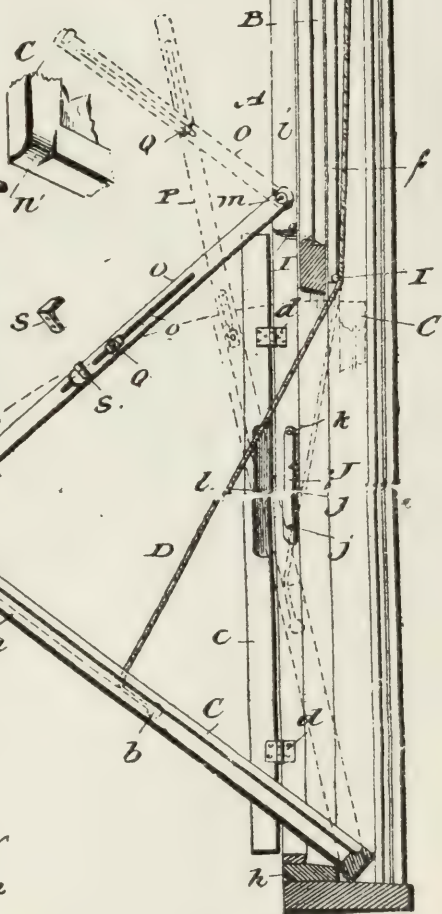
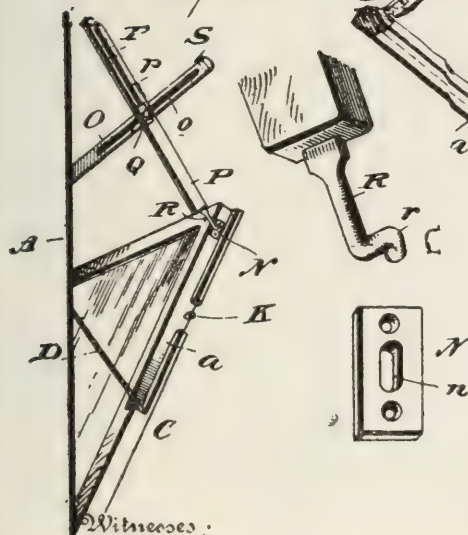


Fig. 5.



Witnesses:

L. C. Hills.
Thos. E. Robertson

Inventor
Oscar Frotcher,
By J. H. Robertson
Attorney.

UNITED STATES PATENT OFFICE.

OSCAR FROTSCHER, OF PHILADELPHIA, PENNSYLVANIA.

WINDOW.

SPECIFICATION forming part of Letters Patent No. 509,521, dated November 28, 1893.

Application filed April 28, 1893. Serial No. 472,212. (No model.)

To all whom it may concern:

Be it known that I, OSCAR FROTSCHER, a citizen of the United States, residing at Philadelphia, in the county of Philadelphia and State of Pennsylvania, have invented certain new and useful Improvements in Windows, of which the following is a specification, reference being had therein to the accompanying drawings.

This invention relates to certain new and useful improvements in windows of that class in which provision is made for allowing the sliding sash to be swung out or reversed if desired for cleaning or other purposes, and it has for its object among others to provide a window of this class which can be cheaply made, easily operated and not liable to get out of order.

It has for a further object to provide simple yet efficient means for holding the sash inclined for ventilation; and for a still further object the provision of means for firmly holding the sash in position for cleaning.

It aims further at certain improvements in the details of construction whereby better results are attained without increasing the cost of construction or interfering with the employment of the window in the ordinary.

Other objects and advantages of the invention will hereafter appear and the novel features thereof will be specifically defined by the appended claims.

The invention is clearly illustrated in the accompanying drawings, which, with the letters of reference marked thereon, form a part of this specification, and in which—

Figure 1 is a vertical section of a window-frame, with the sashes in position. Fig. 2 is a similar view, with the lower sash shown open for ventilation by full lines, and in dotted lines shown open for the purpose of cleaning. Fig. 3 is a like view with the upper sash open for cleaning, the dotted lines showing the said sash in position for introducing the means for holding it firmly in place, the attachment being shown by full lines in the position it assumes when extended. Fig. 4 is a horizontal section through one side of the window with the upper sash indicated by dotted lines. Fig. 5 shows in detail the means for holding the sash in its inclined position for cleaning.

Like letters of reference indicate like parts throughout the several views in which they occur.

Referring now to the details of the drawings by letter, A designates the window-frame, B, the upper, and C the lower sash. The sashes are adapted to slide in the ways in the frame and are hung upon the cords or chains D and weights E, the former running over the pulleys F arranged in the pulley stiles G in any well-known way. Each of the sashes is cut away or rabbeted on the sides adjoining the pulley stiles from about the middle or center of its height upward as indicated *a*, preferably toward the outside of the window as shown best in Fig. 4. Below this rabbet is a hole *b* to receive the cord or chain D which is knotted or fastened in any suitable manner. The lower sash is of usual size and is held in place by a stop-bead *c* which is divided on both sides of the window at a point somewhat above the top of the lower sash and I hinge them to the frame in any suitable manner as by hinges *d* as seen in Figs. 3 and 4. The upper sash is somewhat narrower than the lower one as will be seen from Fig. 4, and the space thus provided is occupied by the projection *e* which may be integral with the pulley stile, or it may be in the form of a cleat separate therefrom and secured thereto in any suitable manner as indicated by dotted lines in Fig. 4; in either form of construction it serves the same purpose. Making the pulley stile thicker than usual and rabbeting the same may be found the preferable way. A parting bead *f* is affixed to this projecting portion and extends from the bottom of the upper sash to the window bead as seen in Fig. 4, projecting about as much as the usual parting strip projects from the frame.

The attachment of the cord or chain to the sash is preferably a little above the center of gravity of the sash so that it will have a tendency to revert to its normal position and at the same time will require but little exertion to hold it in the position for cleaning. The pulleys F are preferably of different sizes, the back pulleys being the thickness of the projection *e* wider than the front one; by this means the weights will hang in their proper positions in the boxes of the frame.

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Against the head of the window frame in the plane of the upper sash I place a strip *g*, and on the sill in the plane of the lower sash I place a strip *h* as seen clearly in Fig. 1; the thickness of the two combined being somewhat greater than the thickness of the meeting rails so as to allow the upper sash to move inward as indicated in Fig. 3. These strips may be independent pieces secured to the head and sill, or they may be formed by making these parts of the frame of thicker wood and rabbeting the same; or the whole thickness required may be located at the head of the window instead of part at the head and part at the sill, as may be found most expedient.

With the parts constructed and arranged substantially as above set forth the operation is as follows: The movable portions of the stop-head are thrown out on their hinges into the position in which the one is shown in Fig. 3; the lower sash can then be brought forward and taken out of the groove or way and can then be reversed on the cords by reason of the cut away portions, for cleaning the outside; when returned to its normal position it can be slid upward inside of its groove or way. The upper sash can then be slid downward and at once brought forward out of its groove or way as seen in Fig. 3. Owing to the sashes being cut away at the sides as indicated at *a* they can be easily reversed without withdrawing them entirely out of the frame, whereas if they were not cut away, it would be necessary to lift the cords out of the grooves in order to draw out the sashes entirely clear of the frame before they could be reversed. The lower sash in order to swing inward more easily should have the outer lower corners rounded off slightly where they are in contact with the cleat or projection in the groove of the upper sash, as shown at *n*; as seen in detail at the right of Fig. 4.

To prevent the rubbing of the chains or cords against the wood in moving the sash inward I secure a screw *I* at the corner of the fixed inside stop bead *i* and also at the corner of the parting strip at the lower end of the same, on both sides of the window; these screws are without projecting heads as seen in Fig. 4.

In order to bring the lower sash inward and hold it in an inclined position as shown in Fig. 2 for ventilation I secure a plate *J* to the pulley stile so that it will hang loosely on either or both sides of the window; this plate is provided with a plurality of notches *j* and is pivoted on a screw or other suitable means *k*, it being covered by the inside stop bead as seen in Fig. 1, which is provided with a recess *l* to receive it as shown in Fig. 3. This plate is beveled on the side of the notches and is adapted to be engaged over a pin or screw *K* secured to the side of the sash and thus the sash can be secured in as many positions as there are notches in the plate. In

bringing the sash in for cleaning this plate must, of course, be disengaged from the pin or screw.

In order to hold and support the sash in an inclined position for cleaning I have provided the following means: At one or both sides of the window I attach to the inside stop bead above the division a plate *M* tapped to receive a thumb screw, and to the side of each sash in the rabbet thereof a plate *N* with an elongated hole *n* as seen best in Fig. 5, where the plate *N* is shown detached. *O* and *P* are bars or strips each provided with an elongated slot *o* and *p* respectively as seen in Figs. 3 and 5, and mounted to slide in these slots is a thumb screw *Q* with a plate upon each side of the said strips to bind them together when the thumb screw is turned in the proper direction. One end of the plate or bar *O* is connected to the plate *M* by a thumb screw *m* while one end of the bar or strip *P* is provided with a casting *R* which has a crook *r* as seen best in Fig. 5 which is adapted to engage the elongated slot of the plate *N*. The operation of this part of the invention is as follows: The strips or bars being loosely connected by the thumb screw in the slots thereof and the thumb screw *m* engaged with the plate *M*, the crook is introduced into the elongated slot *n* of the plate *N* when the sash is brought inward as seen by dotted lines in Fig. 3. The sash is then brought inward to an angle of about forty-five degrees (45°), and as the sash is turned to bring it into this position, as soon as the sash is turned from an upright position the crook turns in the slot and becomes so fixed that it cannot be displaced or disengaged until the sash is brought into its former position, parallel with the strip *P*. When the sash has been brought to an angle of about forty-five degrees, as shown by full lines in Fig. 3 the thumb screw is tightened and the sash will thus be held firmly in that position.

S is an angle plate or iron secured to one of the bars or strips as seen in Fig. 3, and when the bars are brought into the position in which they are shown by full lines in Fig. 3 it serves as a stop to prevent further movement of the bars and prevents one going beyond the other as will be readily understood from reference to Fig. 3. The crook *r* being in a vertical plane about midway between the plates *N* of the upper and lower sash can be used for either.

Modifications in detail may be resorted to without departing from the spirit of the invention or sacrificing any of its advantages. Parts may be used without the whole. The supporting devices may be used in connection with other constructions of window.

What I claim as new is—

1. The combination with a window-frame, of two sashes of different widths, the upper sash being the narrower and each sash having its edge cut away for a portion of its

509,521

- length, a projection between the narrow sash and the frame, and a movable stop bead in front of the bottom sash to provide a space below the upper sash for the withdrawal of the sash, substantially as specified.
2. The combination with a window-frame, of two sashes of different widths, the upper sash being the narrower and each sash having its edge cut away for a portion of its length, the sustaining cords attached to said sash near the end of the cut away portion, a projection between the narrow sash and the frame, a parting strip set in front of the upper sash only and a movable stop bead opposite the lower sash, substantially as and for the purpose specified.
3. The combination with a window frame having two sashes hung therein, the sashes and guides for the same being constructed to allow the top of the sashes to swing inward and downward, of a plate on the sill of the frame in line with the lower sash and a plate in the head of said frame in line with the upper sash, said upper sash being narrower than the lower sash and hung on two cords, one on each side, whereby the top of said sash may swing inward and downward on said cords, under the bottom of the lower sash when the latter is raised, substantially as described.
4. The combination with a sash mounted to swing, of means for holding the same in an inclined position, said means comprising two pivotally and adjustably-connected slotted bars, screws passing through the slots for adjusting them, and means for detachably connecting one of said bars with a sash, substantially as specified.
5. The combination with a window-frame and a sash mounted to swing, of a plate on the sash having an elongated opening and two adjustably-connected slotted bars, one of which is provided with a crook adapted to enter said opening when in one position, and engage with the rear of said plate when turned, substantially as specified.
- In testimony whereof I affix my signature, in presence of two witnesses, this 26th day of April, 1893.
- OSCAR FROTSCHER.
- Witnesses:
JOSHUA R. MORGAN,
OTTO HEROLD.

[Endorsed]: No. 244. U. S. Dist. Court, Nor. Dist. Calif. Deft. Exhibit "B." Filed Feb. 2, '17. W. B. Maling, Clerk.

No. 3004. U. S. Circuit Court of Appeals for the Ninth Circuit. Defendant's Exhibit "B." Filed June 1, 1917. F. D. Monckton, Clerk.

No. 3004

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SIMPLEX WINDOW COMPANY,

Appellant,

VS.

HAUSER REVERSIBLE WINDOW COMPANY, et al.,

Appellees.

BRIEF FOR APPELLANT.

JOHN H. MILLER,

Attorney for Appellant.

Filed

OCT 6 - 1917

F. D. Monckton,

No. 3004

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SIMPLEX WINDOW COMPANY,

Appellant,

VS.

HAUSER REVERSIBLE WINDOW COMPANY, et al.,

Appellees.

BRIEF FOR APPELLANT.

Statement of Facts.

This is an appeal from a final decree in a patent case rendered in favor of the defendants.

Plaintiff below, appellant here, was the Simplex Window Company, a corporation, and the defendants were Hauser Reversible Window Company, a corporation, Frederick and Jessie Hauser.

Two patents were sued on, one No. 1,159,604 of November 9, 1915, issued to the plaintiff as the assignee of the inventors Arthur C. Soule and Louis A. Larsen; and the other No. 1,072,669, issued September 9, 1913, to the plaintiff as the assignee of the inventor Arthur C. Soule.

On this appeal we have concluded to eliminate the first named (Soule & Larsen) patent and to confine ourselves to the second (Soule) patent. In other words, we accept the decision of the lower court in respect of the Soule and Larsen patent and ask a reversal of the decree only in respect of the Soule patent, No. 1,072,669. This will simplify the issues and present for consideration the single question, does the structure of the defendants infringe upon the Soule patent, No. 1,072,669?

The defendants operate under letters patent No. 1,114,260, issued October 20, 1914, to defendant Frederick Hauser, and the question of infringement may be determined from a comparison of the drawings of the Hauser patent with the claims of the Soule patent.

Plaintiff's patent, marked "Plaintiff's Exhibit No. 2, Soule patent", appears between pages 94 and 99 of the record.

A model of plaintiff's device was put in evidence, marked "Plaintiff's Exhibit No. 4, Model of Soule patent" (Rec. 19):

The Hauser patent, which shows the infringing structure, was marked "Defendant's Exhibit A", and appears between pages 100 and 103 of the record.

A model of the Hauser device, marked "Plaintiff's Exhibit No. 5, Defendant's structure", was put in evidence (Rec. 19) by plaintiff.

Also another model was put in evidence by plaintiff, marked "Plaintiff's Exhibit No. 6", being a combined model showing on one side the specific structure of the plaintiff's patent and on the other side the structure of the defendants.

Baldwin Vale, Esq., testified for the plaintiff as an expert witness, and Arthur C. Soule gave testimony regarding the commercial operations of plaintiff.

The only witnesses for the defendants were Frederick Hauser, one of the defendants, and Fred Behnke.

The case was tried before Judge Frank H. Rudkin, sitting in the Northern District of California, and his opinion appears at page 16 of the record. It reads as follows:

"A careful examination of the testimony, exhibits and briefs in this case has failed to convince me that the charge of infringement has been made out. The bill of complaint must therefore be dismissed. Ordered decree be entered accordingly."

In accordance with that decision a decree was rendered dismissing the bill and awarding costs to defendants (Rec. 17-18).

A statement of the evidence on appeal was prepared and the case comes to this court upon the said statement (Rec. 18-67).

The original exhibits were withdrawn from the custody of the lower court and are now here for examination.

PLAINTIFF'S PATENT.

There are eight claims included in the plaintiff's patent, but only claims 1, 4 and 7 are charged to be infringed. Those claims read as follows:

1. A window comprising a frame, a sash slidably pivoted in said frame, adjuster arms, one end of which being fixedly pivoted at points slightly above the middle of the sash stiles, and the other end slidably pivoted in the frame, and carrier arms one end of which is fixedly pivoted in the frame and the other end fixedly pivoted to the corresponding adjuster arm.

4. A window comprising a frame, a sash in said frame, an adjuster arm pivotally secured at one end to said frame and at the other end to said sash, and a carrier arm pivotally secured at one end to said frame and at the other end to said adjuster arm.

7. A reversible window comprising a sash, an adjuster arm of suitable length, a carrier arm supporting said adjuster arm and window sash, a slidable pivoted connection between said frame and one end of said adjuster arm, and a pivoted connection between the other end of said adjuster arm at points near the middle of the sashstiles, about which said sash is rotatable.

On the adjoining page is a reproduction of Fig. 1 of plaintiff's patent, from which the construction of the device will be clearly seen. The invention relates particularly to windows of the swinging reversible sash type, and has for its object the provision of an arrangement which will allow the window to remain in stable equilibrium against wind strains in whatever position it may be placed and to be readily removed from one position to another when desired. Another feature is that the sash is reversible in the frame for the purpose of washing.

Referring to the drawing, which is a side elevation, the numeral 1 represents the window jamb, 2 the stop, and 3 the sash. In the drawing the sash has been represented as moved outward so as to open the window. The numeral 20 represents a groove in the side of the window frame and 16 represents a shoe or block slidable up and down in said groove. To the shoe 16 the sash is pivoted at its upper end so as to rotate on that pivot in its opened and closed position. The details of this pivoting are represented by Fig. 6 of the patent, but it will not be necessary to examine such details. It is sufficient to say that by the structure the sash is slidably pivoted in the frame.

In order to hold the sash in stable equilibrium at any desired point against wind strains, the following mechanism is provided. The numeral 7 designates in the patent an *adjuster arm*, which is fixedly pivoted at its outer end to the sash near the

middle thereof, about two inches above the middle. This pivot is designated by the numeral 9. The other, or inner end of this adjuster arm, is pivoted by the pin 11 to a sliding block or fixture 12 located in the groove 20 at the lower end of the frame and adapted to move up and down in said groove. When the window is closed, the fixture 12, carrying the inner end of the adjuster arm, will be located at the bottom of the groove, and when the sash is moved outward, this fixture 12 will move upward in the groove in the position shown in the drawing.

The particular details of this sliding fixture are shown in Figs. 4, 5 and 7, but they are of no material consequence here.

In addition to the above, and for the purposes of securing the general equilibrium desired and for allowing the window to be readily shifted from one position to the other, there is provided another arm, called a *carrier arm*, designated by the numeral 4. One end of this arm is pivoted to the adjuster arm 7, by a pivot 10, at a point about one-third the length of the adjuster arm measured from the pivot 9, while the other end of this carrier arm 4 is pivoted to the window frame by means of the pin 6 in a wearing plate 5 which is set in the jamb by screws. It is preferable that the lower part of this carrier arm 4 should be curved, but this curving is not essential and is not called for by the claims.

The mode of operation of the device will be as follows: Assuming that the window is closed and it is desired to open it and hold it open at any particular point, the operator pushes outward against the lower end of the sash 3, which moves or tilts it outward in the direction shown by the arrow, causing the sliding block 12, to which the lower end of the adjuster arm 7 is attached, to move upward in the groove of the window frame, and the sash will assume the position shown in the drawing. It is evident that the sash will be held open at any desired point against wind strains. When it is desired to close the window, the sash is moved back into the initial position by pulling the lower end of the sash inward, the sliding block 12 moving down to the bottom of the groove and the arms 4 and 7 folding up like a jack knife. It is apparent that the sash is reversible in the window frame.

We shall now consider briefly the claims in suit, and as claim 4 appears to be the broadest one, we shall take that as the first in order. It reads as follows:

Claim 4.

“A window comprising a frame, a sash in said frame, an adjuster arm pivotally secured at one end to said frame and at the other end to said sash, and a carrier arm pivotally secured at one end to said frame and at the other to said adjuster arm.”

This is a combination claim consisting of the following elements: (1) a frame; (2) a sash; (3) an adjuster arm pivotally secured at one end to the frame and at the other end to the sash, and (4) a carrier arm pivotally secured at one end to the frame and at the other end to the adjuster arm.

Referring to the device by the numerals shown on the drawing this is a combination of 1 plus 3, plus 7, plus 4, that is to say, a frame, a sash, an adjuster arm, and a carrier arm.

Claim 7.

“A reversible window comprising a sash, an adjuster arm of suitable length, a carrier arm supporting said adjuster arm and window sash, a slidable pivoted connection between said frame and one end of said adjuster arm, and a pivoted connection between the other end of said adjuster arm and points near the middle of the sash-stiles, about which said sash is rotatable.”

This is a combination of the following elements: (1) a sash; (2) an adjuster arm; (3) a carrier arm supporting the adjuster arm and the sash; (4) a slidable pivoted connection between the frame and one end of the adjuster arm; (5) a pivoted connection between the other end of the adjuster arm at a point near the middle of the sash about which the sash is rotated. And the claim is further characterized by the attribute of reversibility of the sash.

Claim 1.

“A window comprising a frame, a sash slidably pivoted in said frame, adjuster arms, one

end of which being fixedly pivoted at points slightly above the middle of the sash-stiles, and the other end slidably pivoted in the frame, and carrier arms one end of which is fixedly pivoted in the frame and the other end fixedly pivoted to the corresponding adjuster arm."

This is a combination of the following elements: (1) a frame; (2) a sash slidably pivoted in the frame; (3) adjuster arms having one end fixedly pivoted at points slightly above the middle of the sash and the other end slidably pivoted in the frame; (4) carrier arms having one end fixedly pivoted to the frame and the other end fixedly pivoted to the adjuster arm.

This claim 1 takes in both sides of the window, whereas the other two claims take in only one side. It is to be remembered that in the structure of the patent there is an adjuster arm on each side of the window, and there is a carrier arm attached to each of the adjuster arms, thereby providing two adjuster arms and two carrier arms. This claim 1 calls for the two adjuster arms and the two carrier arms in a complete structure, whereas the other two claims call for only one adjuster arm and one carrier arm.

These three claims are framed in clear language and there does not appear to be any ambiguity regarding the elements. No anticipations are set up, nor is the validity of the claims challenged. We think, therefore, that we are safe in assuming that these claims must be considered as broad and com-

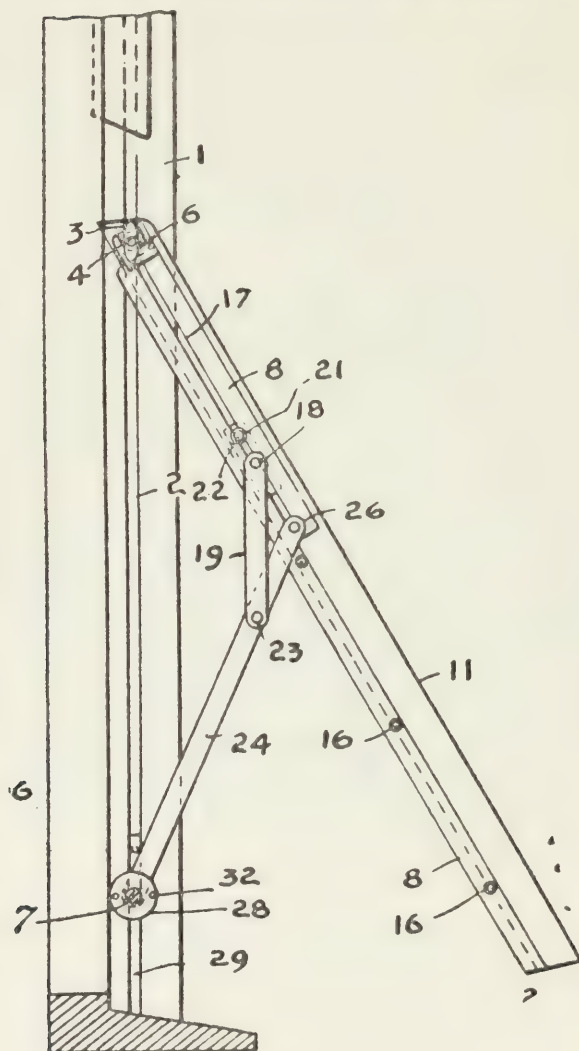
prehensive claims. We assert that the patent is the first of its kind in the art and shows a pioneer invention. Had it been otherwise, anticipating structures would have been shown. The only prior patented structure which was shown, but for what purpose passes our comprehension, is a patent to Frotscher, No. 509,521, of November 28, 1893, appearing between pages 104 and 108 of the record. It is also shown by "Defendant's Model Exhibit B".

It is a wholly different structure from anything shown in our patent and has no relevancy except as showing a useless and impracticable device. The defendant Frederick Hauser testified to that effect. At page 53 of the record we find him saying in regard to the Frotscher patent:

"I never made any windows like that; I didn't want to make them like that; they are useless; I found out they are useless with windows made that way, so I got up my own idea which is a useful device; the other one is not a practical or a useful device; I say it is not a useful device; no, you can not use it, but I would like to explain it a little better; you can use it, but it is, in other words, not practicable, not a practicable device; they do not use it at all any more."

In further support of our contention regarding the utility and pioneership of the Soule patent we refer to the testimony of Mr. Soule on page 42, et seq., where he says that the plaintiff has put the invention on the market with great success throughout the Pacific Coast and the Eastern States to the

FIG. 2 OF HAUSER PATENT. No. 1,114,260.



extent of selling over 150,000. The device is extensively used in Washington, Oregon, California, Arizona, Texas, New York, Georgia, Florida, Louisiana, Illinois, Minnesota, Ohio and Pennsylvania (Rec. 43).

In view of the record and in the absence of any thing shown to the contrary, we assert that the Soule invention is of a broad and pioneer character and entitled to a liberal application of the doctrine of equivalents.

DEFENDANTS' STRUCTURE.

Defendants' structure is shown by the model marked "Plaintiff's Exhibit No. 5, Defendants' Structure" and also by the Hauser patent, No. 1,114,260, of October 20, 1914. On the adjoining page is reproduced Fig. 2 of that patent, which is a vertical section showing the sash open. The numeral 1 represents the side frame and 2 the groove therein running from top to bottom. In this groove 2 a metal block 3 is adapted to slide up and down. To this metal block is pivoted the upper end of the sash 11. The numeral 24 represents an adjuster arm pivoted at its lower end to a stationary block in the groove of the window frame and at the upper end it is pivoted to the window sash at a point 26 slightly beyond the center, which is the point where Soule pivots his adjuster arm. To this adjuster arm at the point 23, which is the point at

which Soule attaches his carrier arm, is pivoted a carrier arm 19 (called in the Hauser patent a *link*); while the upper end of this carrier arm or link is pivoted to a sliding mechanism located in a groove in the window frame.

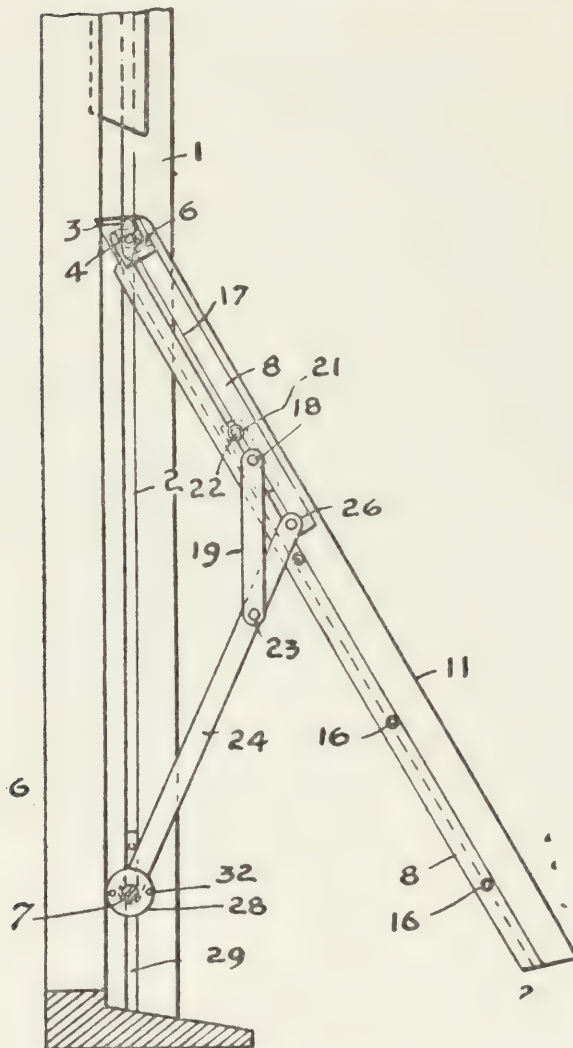
The operation of the mechanism is apparent. Assuming the window to be closed and it is desired to open the same, the operator pushes on the lower end of the sash outwardly, which causes the upper end of the sash to move downward in the groove in the window frame, while the adjuster arm and carrier arm move outwardly and assume the positions shown in the drawing. When it is desired to close the window, the sash is moved in the reverse direction, thus causing the upper end of the sash to move upward in the groove in the frame and the carrier arm 19 to slide upward in the groove in the sash, both arms folding up like a jack knife. It is apparent that the sash is reversible in the frame as in the Soule structure.

Comparing this mechanism with the drawing of the Soule patent it will be seen that the only difference in construction is that in the Soule device the upper end of the carrier arm 4 is *fixedly* pivoted to the window *frame*, whereas in the Hauser construction the upper end of the carrier arm is *slidably* pivoted to the window *sash*, and also in the Soule device the lower end of the adjuster arm 7 is *slidably* pivoted to the frame, whereas in Hauser that attachment is a *fixed* one. In order to com-

compensate for this change Hauser has located his sliding mechanism in the window frame. To make it a little clearer, Hauser has removed the inner end of Soule's carrier arm 4 from its point of attachment in the window frame and transposed it to the window sash. This new location required that the attachment be a slidable one. If it were not slidable, but was fixed, then the sash would be held in a permanent fixed position and could not be moved at all, because the construction would in such event be that of a truss. Hence he made it slidable in a groove.

But no new result is obtained by this transposition nor any new mode of operation. Identically the same result is attained in both instances by the same mode of operation. All the elements are necessary to successfully operate in each case, and it is merely a change of location of one particular element. The elements are window frame, sash, adjuster arm, carrier arm, and sliding mechanism. Hauser has all those elements. It is absolutely necessary for him to have all those elements. Otherwise his window would not operate. This reduces the controversy to the single point that a change in the position of one of the parts of a machine does not avert infringement where the part transposed performs the same function after the change as before unattended by any change in mode of operation.

FIG. 2 OF HAUSER PATENT. No. 1,114,260.



COMPARISON OF THE HAUSER DEVICE WITH THE
SOULE CLAIMS.

Now permit us to compare the Hauser structure with the Soule claims, element for element, taking up claim 4 first.

The elements of claim 4 are (1) a frame; (2) a sash located in the frame; (3) an adjuster arm pivotally secured at one end to the frame and at the other end to the sash; and (4) a carrier arm pivotally secured at one end to the frame and at the other end to the adjuster arm.

Referring now to the drawing of the Hauser device reproduced on the opposite page, we find that it contains a frame, designated by the numeral 1; a sash located in the frame, designated by the numeral 11; an adjuster arm, designated by the numeral 24, which is secured at one end to the window frame and at the other end to the window sash; and finally, it has a carrier arm, designated by the numeral 19, pivotally secured at one end to the adjuster arm and pivotally secured at the other end to the sash.

In the Soule structure this carrier arm is pivotally secured at the upper end to the window *frame*, whereas in the Hauser structure, the pivotal attachment of the carrier arm at its upper end, is to the window *sash*. In other words, the sole and only difference between the two structures is that in the Soule structure one end of the carrier arm is attached to the *frame*, while in the Hauser struc-

ture that end of the carrier arm is attached to the *sash*.

This is merely a change in the location of one of the elements of the combination. But this change in location effects no different result. On the contrary, it produces identically the same result. In the Hauser structure when the sash is moved outward or inward, the pivoted end of the carrier arm 19 slides up and down in a groove in the sash and the various pivoted parts open and close like a jack knife. In the Soule structure the lower end of the adjuster arm slides up and down in a groove in the window frame and the connected pivoted parts open and close like a jack knife. As stated before, the only change made is one of location as to the point of attachment of one of the elements without introducing in the structure any new mode of operation or accomplishing any different result.

Now consider claim 7 of the Soule patent. That claim contains as elements (1) a sash; (2) an adjuster arm; (3) a carrier arm supporting the adjuster arm and the sash; (4) a slidable pivoted connection between the frame and one end of the adjuster arm, and (5) a pivoted connection between the other end of the adjuster arm at a point near the middle of the sash about which the sash is rotatable.

The only point to consider in respect of this claim is element 4, which calls for a *slidable* pivotal

connection between the frame and one end of the adjuster arm. That slidable pivotal connection is shown in the drawing of the Soule patent to consist of a block 12, to which the lower end of the adjuster arm is attached, and this block slides up and down in the groove in the window frame. Now in the Hauser structure the lower end of the adjuster arm does not slide in the groove of the window frame, but is *fixedly* pivoted there, and in order to compensate for this the sliding mechanism has been transferred to a groove in the window sash, in which the end of the carrier arm slides. Here again we find a mere change of location without any change in result or mode of operation. Hence the change of location is inconsequential and the two structures are mechanical equivalents.

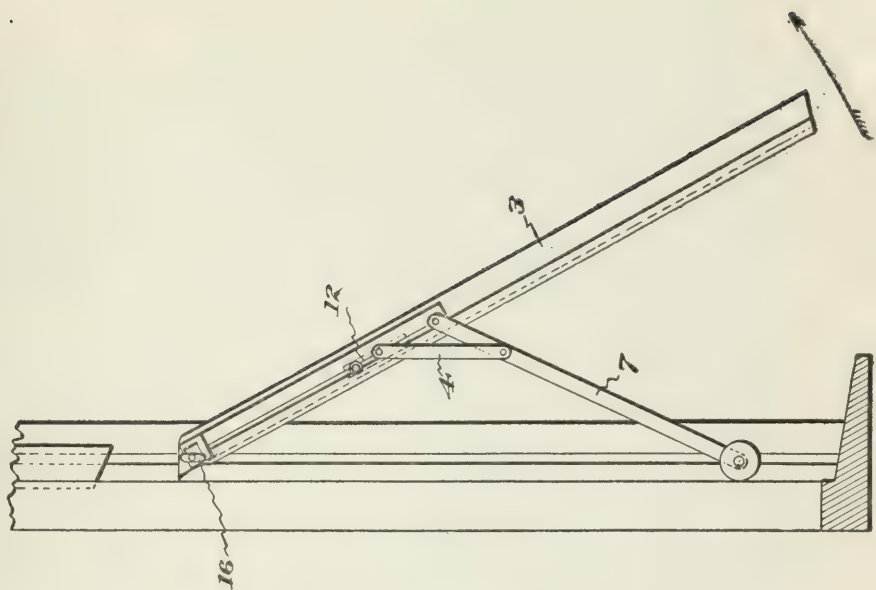
The elements of claim 1 are (1) a window frame; (2) a sash slidably pivoted in the frame; (3) adjuster arms having one end fixedly pivoted at points slightly above the middle of the sash and the other end slidably pivoted in the frame, and (4) carrier arms having one end fixedly pivoted to the frame and the other end fixedly pivoted to the adjuster arm.

From what has already been said it will be seen that the only difference between the language of this combination and the Hauser structure is that whereas in the Soule structure the lower end of the adjuster arm is *slidably* pivoted to the frame and the outer end of the carrier arm is *fixedly* pivoted

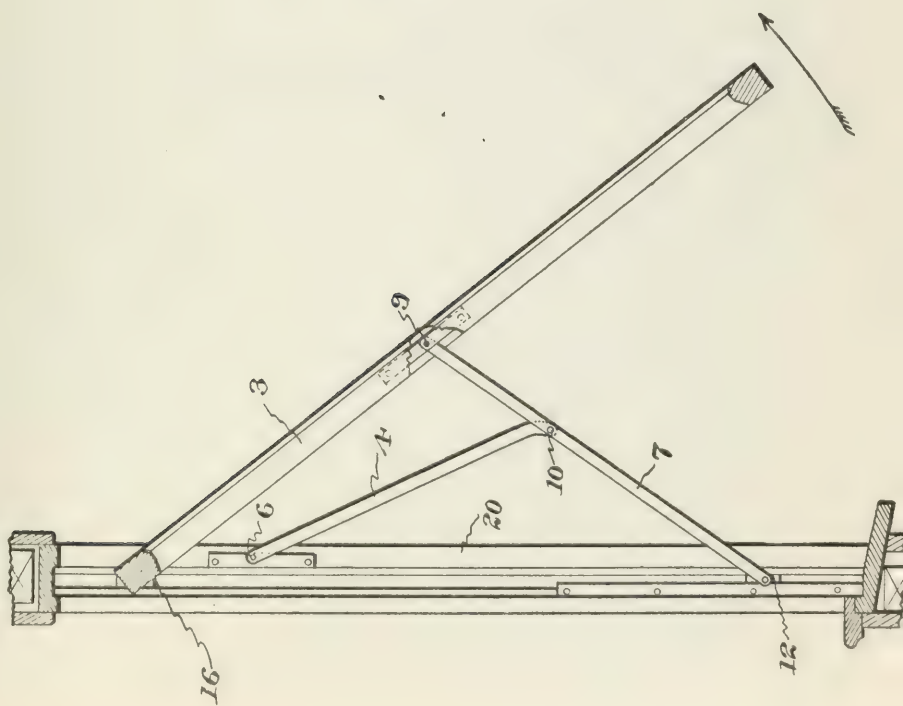
to the *frame*, in the Hauser structure the lower end of the adjuster arm is *fixedly* pivoted to the frame and the upper end of the carrier arm is *slidably* pivoted to the *sash*. Here again we have merely a change of location without any change of mode of operation or the result effected. We submit that the mere changes in detail above noted are, from a patent point of view, inconsequential, and that the Hauser structure is a mechanical equivalent of the Soule structure in so far as the three claims in question are concerned.

In order that the court may have a clear conception of the matter at a glance, we have reproduced on the adjoining page two cuts, one showing the Soule structure and the other showing the Hauser structure. The lettering used is taken from the Soule patent and applied to both diagrams. It will be seen from these two diagrams that all of the elements of the Soule claims have been utilized in the Hauser structure, and that the sole and only difference is a change of location of one of the elements by Hauser. He has merely changed the pivoting of the upper end of Soule's carrier arm from the window frame and located it in the window sash and made it slidable in the sash. No different result is produced nor any different mode of operation.

HAUSER



SOULE



Law of the Case.

At Sec. 348 of *Walker on Patents*, the law applicable to this case is stated in the following words:

“Changing the relative positions of the parts of a machine or manufacture does not avert infringement, where the parts transposed perform the same respective functions after the change as before.”

This is a very ancient rule of law. The first reported case involving it is *Potter v. Schenck*, 3 Fish. 82, also reported in 19 Fed. Cas. 1182. The patent involved was one of the early sewing machine patents, issued in 1856, and the claim called for a feeding apparatus placed *underneath* the plate upon which the cloth rested. The defendant had used these same elements, but had placed the feeding apparatus *above* the plate, thus presenting the case of a change of location. No new result was produced by the change nor any difference in the mode of operation. Judge Drummond, in referring to the infringing device, used this language:

“The shoe or main part of the feeding apparatus, is not placed beneath the plate upon which the cloth rests, but is on the top of the plate, or, as was contended, and I think with a good deal of force, by the counsel for the complainants, instead of being placed as Wilson describes it, it was merely reversed. It is clear that that does not change the principle of the invention, and it is clear, too, as already stated, that a mechanic once having the idea in his mind could apply it by adopting a great variety of forms and devices, and this among others.”

The next reported case on the subject is that of *Adams v. Joliet Mfg. Co.*, 1 Fed. Cas. 123. There the invention was a "beater-shaft" used in a corn-sheller for the purpose of forcing the ears of corn into the throat of the sheller. In the patent this beater was claimed as being located in a certain position, whereas the defendant had changed its location to a different position. No new result, however, was accomplished by this change of location, nor was any new function performed by the changed member. The court said:

"A change of location of a part in a combination, where there is no new function performed by the changed member in its new location, will not evade a patent."

And in support of this rule of law the court cited the prior case of *Potter v. Schenck*.

Another case in point is that of *Knox v. Great Western Quick-Silver Co.*, 14 Fed. Cas. 810, where the outlet vapor-flue of a quicksilver furnace was transferred by the defendant from the position shown in the patent to a different position. That case was in this circuit, and Judge Sawyer decreed an infringement. Referring to defendant's device, he said:

"It is substantially the same combination of the same parts, and the same number of parts, all operating in substantially the same way and producing the same results, the only change being in the place of the outlet vapor-flue."

He then proceeded to quote from the case of *Adams v. Joliet Mfg. Co.*, as follows:

“A change of location of a part, in a combination, where there is no new function performed by the changed member in its new location, will not evade a patent.”

And after making said quotation he applied it to the case before him as follows:

“In this case the changed part—if, in the view suggested, there can be said to be a change—performs no new function. It operates in precisely the same way and accomplishes the same result in the same mode in the combination.”

In *Schlicht v. Chicago Sewing Machine Co.*, 36 Fed. Rep. 585, the invention was a letter-file, which called for the combination of *rocking* transfer wires with *fixed* receiving wires. The defendant reversed these positions by making the transfer wires *fixed* and the receiving wires *rocking*. This was held to be ineffectual, and infringement was decreed. The court said:

“This seems to me to be merely a colorable change in the construction of the device; the transfer of the function of movement from the vibrating wires to the receiving wires is merely such a change as, with the complainant’s patent before him, any mechanic might readily make, and is but an attempt at an evasion of the idea covered by the complainant’s patent.”

Another pertinent case is *Consolidated Roller Mill Co. v. Coombs*, 39 Fed. 25, where the court said (pages 33-4):

“The change of the location of an element in a combination, where there is no new function performed by such element in its new location, will not evade the charge of infringement.”

A still more pertinent case is that of *Metallic Extraction Co. v. Brown*, 104 Fed. 352. The claim there involved related to an ore-roasting furnace, and it called for a combination in which one of the elements was stated to be a supplemental chamber *located at the side of the main chamber*. The defendant had transferred this supplemental chamber to the *bottom* of the main chamber. In other words, he simply changed the location of that element without producing any new result, and the court held that it was clearly an infringement for the reason that a mere change of location unattended by a new result does not evade infringement. In deciding the case, the court relied largely upon the cases of *Winans v. Denmead*, 14 How. 330, and *Hoyt v. Horne*, 145 U. S. 302.

In the *Winans* case the patentee had claimed a car body made *in the form of the frustrum of a cone*, whereas the defendant had used a car body made *in the form of the frustrum of a pyramid*. The same result was produced, however, in each case by the same principle of operation, and notwithstanding the specific language of the claim the Supreme Court held that the pyramidal form was an infringement of the conical form.

In the case of *Hoyt v. Horne* cited, the patent covered a machine for beating rags and other

fibrous material into pulp, and in his claim the patentee had described his improvement as consisting in circulating the fibrous material and liquid *in vertical planes*. By making slight changes of location in certain parts of the machine described by the patent, the defendant produced a device which caused the pulp to circulate *in a horizontal plane* instead of in a vertical plane. This change of circulating planes followed from the change of location of certain parts of the machine. The Supreme Court held this change to be ineffectual and decreed an infringement.

Rodebaugh v. Jackson, 37 Fed. 882 (886), is a case where the difference between pivoting a rod at the *bottom* and the *top* was held to be immaterial in the sense of the patent law. At page 886 the court said:

“* * * and it is entirely clear to our mind that the defendants device differs from that of Rodebaugh only in the rearrangement of the combination, by which a connecting rod, operating by a thrust and articulating with the movable shaft at the bottom, is substituted for the connecting strap F, operating by tension and articulating with the reciprocating shaft at the top by means of the arm G. In this particular the case is much like that of *Ives v. Hamilton*, 92 U. S. 426.”

Strictly in point is *B. F. Avery & Sons v. J. I. Case Plow Works*, 148 Fed. 219-20, where the difference between the infringing device and the patent

was in the location of one of the parts of the combination. The court said (page 220):

“Here the result is obtained quite irrespective of the location of the upper ends of the brace-rods. Appellants reach the result by one location of the material element; appellee by another location equally well known, and the state of the art does not require the novelty of the claims to be predicated on a particular location.”

The true rule of construction deducible from the authorities and applicable to this case is found in the case of *Benbow-Brammer Mfg. Co. v. Simpson Mfg. Co.*, 132 Fed. 614. There the claim of the patent contained a specifically described element, to wit: “a double row” of teeth. The defendant had used “a single row” of teeth. But the court held that the two were mechanical equivalents, and notwithstanding this specific designation of the element in the claim, infringement was found. The rule is there stated as follows:

“The specific description in the claim of an element does not operate as a limitation to the form thus shown, unless it is of the essence of the invention, and evasion of the specified form will not escape infringement, where the substance of the invention is copied.”

In support of this rule the court cited the cases of *Ives v. Hamilton*, 92 U. S. 426; *Machine Co. v. Murphy*, 97 U. S. 120; *Hoyt v. Horne*, 145 U. S. 302; and sundry cases from the various circuit courts of appeal throughout the United States.

Another case in point is that of *Columbia Wire Co. v. Kokomo Steel & Wire Co.*, 143 Fed. 122, where the Court of Appeals for the Seventh Circuit considered the case of a mere transposition of parts, and at page 122 we read the following:

“We are of the opinion that the means thus transposed in the appellee’s machine, if not within the definition of colorable evasions which infringe the patent in any view of its scope, are plain appropriations of the essence of the Bates conception by equivalent means, and infringements of the patent within the well settled rule referred to. All the elements of the patented combination are employed with substantial identity in their use, and departure appears from the letter of the claims only, in the arrangement of these elements, without substantial difference in the principle of operation. The policy and rules of the patent law require that the patentee be protected against such evasions of the wording of a claim in form or non-essential details, when the substance of the invention is thus used and is unmistakably shown in the specifications and claims.”

At this point it may not be out of place to refer to the case of *Machine Co. v. Murphy*, 97 U. S. 120, where the Supreme Court laid down the doctrine of equivalency. It is there said:

“Except where form is of the essence of the invention it has little weight in the decision of such an issue, the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function

they perform, and how they perform it, and to find that one thing is substantially the same as another, if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained.

* * *

“Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape.”

In applying the doctrine of this citation, this court, through Judge Gilbert, uses the following language in the case of *American Can Company v. Hickmott*, 142 Fed. 141:

“It is the whole purpose of the doctrine of equivalency to protect the inventor against piracy and to secure to him the benefit of that which he has invented.”

Along the same line we venture to cite another decision of this court, *Norton v. Jensen*, 49 Fed. 859, where the court, through Judge Hawley, expressed itself as follows:

“No one can avoid infringement simply by means of ingenious diversities of form and proportion, presenting simply the appearance of something unlike the patented machine. It is well settled that a copy of the principle or mode of operation described in the prior patent is an infringement of it. If the patentee’s ideas are found in the construction and arrangement of the subsequent device, no matter what may be its form, shape, or appearance, the parties making or using it are deemed appropriators of the patented invention, and are infringers. An infringement takes place whenever a party avails himself of the invention of the patentee without such a variation as constitutes a new discovery.

“Judge Nelson in *Blanchard v. Beers*, 2 Blatchf. 416, said that—

“‘The sure test and one the jury should be guided by in all cases of this kind, is whether or not the defendant’s machine, whatever may be its form or mechanical construction, has incorporated within it the principle, or the combination, or the novel ideas which constitute the improvement to be found in the plaintiff’s machine. If it does, then, no matter what may be its mechanical construction or its form, it is an infringement, an appropriation of the ideas of another, simply in a different form.’

“The same learned judge in *Tatham v. LeRoy*, 2 Blatchf. 486, said:

“‘Formal changes are nothing—mere mechanical changes are nothing; all these may be outside of the description to be found in the patent, and yet the machine, after it has been thus changed in its construction, is still the machine of the patentee, because it contains his invention, the fruits of his mind, and embodies the discovery which he has brought into existence and put into practical operation.’”

We also venture to remind the court at this point of another rule of construction, and that is, that *a claim may be infringed even though the infringing device is not within the letter of the claim*. This rule was announced by the Supreme Court in the case of *Westinghouse v. Boyden*, 170 U. S. 568, where it was said:

“We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided.”

And in support of that ruling the Supreme Court cited:

Machine Co. v. Murphy, 97 U. S. 120;

Ives v. Hamilton, 92 U. S. 426;

Morey v. Lockwood, 8 Wall. 230;

Elizabeth v. Pavement Co., 97 U. S. 126;

Sessions v. Romadka, 145 U. S. 29; and

Hoyt v. Horne, 145 U. S. 302.

A CONCLUSIVE CITATION.

In conclusion we call the court's attention to an authority, which, in our judgment, is decisive. It is the Supreme Court case of *Ives v. Hamilton*, 92 U. S. 426, a leading case on the point under discussion. The patented device related to a saw-mill, and consisted, among other things, in pivoting the lower end of the saw to the pitman (connecting rod) *above* the crosshead. The defendant pivoted the lower end of his saw to the pitman

below the crosshead, thus avoiding the language of the claim. The court held this change of location to be inconsequential, and in rendering the decision Judge Bradley said:

“The attaching of the lower end of the saw to the pitman below the cross-head, instead of above it, and thereby getting the same movement as before by reversing the motion of the crank, is no change in principle. This is too obvious for discussion. The combination of the two things in the defendants’ mill—namely, the crooked guides above, and the connection of the saw with the pitman below at a point removed from its center of motion (both being calculated to give to the saw the precise rocking or vibratory motion desired)—is a close copy of the plaintiff’s invention; quite as close as is usually made by those who attempt to evade a patent whilst they seek to use the substance of the invention.”

It seems to us that this citation is decisive of the case at bar. We cannot conceive of two cases more closely analogous in principle. If Soule’s invention had been specific in character, merely an improvement on the prior devices, a different question would be presented. But his invention is basic and of pioneer character. He was the first in the art to provide a satisfactory device for tilting windows, whereby they could be brought to any desired position and there automatically held against ordinary strains without the intervention of separate locking mechanisms. It stands in the window art in the same favorable position that the saw patent stood in the sawing art described in the

case of *Ives v. Hamilton*. If it was an infringement for the defendant Ives to pivot his saw below the crosshead, notwithstanding the fact that Hamilton's patent called for a pivoting above the crosshead, it logically follows that it is an infringement for the defendant Hauser in the case at bar to pivot the upper end of his carrier arm to the sash, notwithstanding the fact that Soule's patent calls for a pivoting to the frame. And this must follow because this change of the pivot point produces no new result or new mode of operation. Such is the case here in a nutshell. It presents a definite and clearly defined issue based on an elementary proposition of patent law.

It would seem to be a useless task to analyze further cases in detail, and, therefore, we content ourselves with merely citing the following without further comment:

- Blake v. Eagle Works*, 3 Fed. Cas. 590;
- Dane v. Illinois Mfg. Co.*, 6 Fed. Cas. 1147;
- Gilbert & Barker v. Tirrell*, 10 Fed. Cas. 350;
- Gilbert & Barker v. Walworth*, 10 Fed. Cas. 352;
- King v. Maudelbaum*, 14 Fed. Cas. 536;
- Marsh v. Dodge*, 16 Fed. Cas. 805;
- Sewing Machine Co. v. Eames*, 6 Fed. Cas. 181;
- Belle v Lucas*, 28 Fed. Rep. 371;
- Ames v. Bellaire*, 28 Fed. Rep. 360;
- Kirk v. DuBois*, 33 Fed. Rep. 252 (affirmed 158 U. S. 58);

Adams v. Folger, 120 Fed. Rep. 260 (263);
Indiana Mfg. Co. v. J. I. Case, 154 Fed. Rep.
 369;
Cazier v. Mackie-Lovejoy, 138 Fed. Rep. 654;
Beech v. American Box Co., 63 Fed. Rep. 597;
King Are Co. v. Hubbard, 97 Fed. Rep. 795;
Calculagraph v. Wilson, 132 Fed. Rep. 20;
Anchor Cap Co. v. Pritchard, 232 Fed. Rep.
 159.

Conclusion.

The only theory on which we can account for the strange error of the trial court in rendering a decree of non-infringement is our belief that the lower court did not give sufficient consideration to the matter in hand. The trial judge was the Honorable Frank H. Rudkin, of Spokane, who had been specially called in to supply the place of Judge Van Fleet, who at the time of this trial was sitting in the District Court at New York. The case was tried in open court and was decided a short time after its submission. It was the last case on the calendar, and Judge Rudkin was anxious to return to Spokane where urgent business was requiring his attention. We believe that the necessity for his hurried departure prevented him from giving to this case the careful attention which should have been given. It is true that we filed a memorandum typewritten brief, but it contained only five pages relating to this patent. It was in purely

skeleton form and did not go into a close analysis of the matter. Possibly we were at fault in that behalf, but our excuse is that we considered the matter so plain and elementary that we did not deem it necessary to exert ourselves to the utmost. In that brief the only case we cited was that of *Metallic Extraction Co. v. Brown*, 104 Fed. 352. No other case herein was called to the attention of the court, and we believe that our misfortune in the lower court arose from not heeding the maxim "Beware of a plain case".

As we view the matter, this case is exceedingly simple and presents an elementary proposition of patent law. We insist that the decree is erroneous, palpably so, and should be reversed in the ends of substantial justice.

Dated, San Francisco,

September 26, 1917.

Respectfully submitted,

JOHN H. MILLER,

Attorney for Appellant.

No. 3004.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

SIMPLEX WINDOW COMPANY,

Appellant,

vs.

HAUSER REVERSIBLE WINDOW COMPANY, et al.,

Appellees.

BRIEF FOR APPELLEES

SCRIVNER & HETTMAN,
Attorneys for Appellees.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

SIMPLEX WINDOW COMPANY,	} No. 3004
<i>Appellant,</i>	
vs.	
HAUSER REVERSIBLE WINDOW	
COMPANY, ET AL.,	} <i>Appellees.</i>

BRIEF FOR APPELLEES.

The general statement of the proceedings in this case is fairly stated in the appellant's brief; hence, we will at once take up the questions involved in this appeal, as we understand them.

The questions are:

1st: As to the validity of the first, fourth and seventh claims of the Soule patent, now before the Court;

2nd: Whether or not the defendant's patented device is an infringement of either of said claims.

Appellees claim that each of these claims is void for want of invention and patentable novelty, and that if either of them is valid the appellees' device does not infringe either of said claims. The three claims sued upon are for precisely the same structure and in our analysis of the appellant's alleged invention we will confine ourselves especially to Claim 1, because what may be said of Claim 1 applies to the other two. It may be said in passing, however, that the fourth claim of the patent is clearly too broad; taking it literally, it would cover a device absolutely inoperative. It is so broad that, as it reads, it would cover an adjuster arm fixedly pivoted at one end to the frame, and at the other end to said sash, and a carrier arm fixedly pivoted at one end to said frame, and at the other end to said adjuster arm. This is not the structure of either the appellant or the appellees, and would be wholly inoperative. But, of course, in construing the claim reference has to be made to the specification and it could only cover the structure described or plain mechanical equivalents. What is said in regard to that claim, we ask to be applied to claims "4" and "7."

Claim "1" comprises the following elements:

- (a)—A window comprising
- (b)—A frame, a sash slidably pivoted in said frame,
- (c)—Adjuster arms, one end of which being fixedly pivoted at points slightly above the

middle of the sash stiles, and the other end slidably pivoted in the frame,

- (d)—Carrier arms, one end of which is fixedly pivoted in the frame and the other end fixedly pivoted to the corresponding adjuster arm.

The controversy hinges around the adjuster arm "7" and the carrier arm "4."

Looking at Fig. 1 of the drawings the claimed construction is readily comprehended. The sash is slidably fixed in the frame at the top, the adjuster arm "7" is fixedly pivoted at "9" to the sash at a point slightly above the middle, and the other end slidably pivoted at "12" to the frame or jamb of the frame. The idea of the inventor, of the functions to be performed by this element is clear. If he desired to adjust the sash "3" it was thought necessary that one end of this arm should give by a sliding motion, otherwise the arm and the sash would (it was supposed) remain stationary, so he arranged the lower end of his adjuster arm in a groove in the jambs with certain slidable fixtures in such a manner that when the sash was closed the lower end would slide down at the lower end of the jamb, and the sash would occupy its first stage of stable equilibrium (folio 80, second column of the patent), and when it was desirable to raise the sash, the lower end of the arm would slide upward to "12," and the sash would then be in a second position of stable equilibrium (folio 85, sec-

ond column of patent). It is evident that at this point the only force that held the adjuster arm and sash in an open or fixed stable position was the frictional force of the slidable devices in the slot at "12." It is also evident that the only function of this arm was to adjust the sash to any desired position and hold it there. It is also equally apparent that if the slidable devices at "12" are of sufficient strength and tension, which they would have if properly constructed, the adjuster arm and sash will be held in any desired position to meet all ordinary uses. There is no novelty or invention in this arrangement alone, for window frames with a single arm fixedly pivoted to the jamb at the lower end and fixedly pivoted to the sash at the upper end are now and have been in public use all over the country for many years, as will hereafter be shown. In this old construction the sash is slidably pivoted to the frame and as the sash is raised or lowered for the purposes of adjustment it slides up and down in the frame. This construction is an entirely operative device. The foregoing statement, as to the operation of adjuster arm "7," is borne out by the language of the specification at folio "85," second column, page "1," where it is said:

"It (the sash) is given stable equilibrium in other positions (other than the closed position) by the adjuster arm '7'."

This, of course, is a natural result of having one end pivoted to the sash and the other slidably pivoted to

the jamb by means of the frictional devices specifically described. The friction of these frictional devices at "12," being amply sufficient to hold the sash in stable equilibrium for all practical and useful purposes.

These sliding fixtures are shown in Figs. "4," "5" and "7," but their peculiar construction is not involved here.

Taking up the third element of this claim, we find it described at folio "100," second column, page "1" of the specification as follows:

"For further securing the general equilibrium described and for allowing the window (sash) to be readily shifted from one position to another, I provide carrier arm '4,' one end of which is pivoted to the corresponding adjuster arm '7' by pivot '10,' at a point about $\frac{1}{3}$ the length of said arm measured from the point '9.' The other end of the carrier arm '4' is pivoted to the frame by means of the pivot '6,' etc."

At first blush one reading this description would naturally suppose there was something in it, but a moment's thought, with a little analysis, and it fades into a mere shade of a shadow. Let us see: it is asserted that this carrier arm is for the purpose of securing the "general equilibrium." What does the inventor mean by the "general equilibrium"? We are already told that the sash is given stable equilibrium by the arm "7"; so, without the carrier arm "4" the sash is in stable equilibrium. This means that the

sash or window was firmly established, not easily moved or shaken. (See page "37," Tr.) This being so, what useful purpose would be subserved by "further securing the general equilibrium"? We fail to see how this arm with both ends fixedly pivoted, one end to the adjuster arm and the other to the jamb or frame, can affect in any manner the stable equilibrium caused by the adjuster arm "7." It is evident that the carrier arm "4" is wholly controlled by the adjuster arm "7." When the latter is caused to slide up or down by the application of force to the sash to overcome the resistance caused by the slidably frictional devices at "12," it moves up or down in unison with it. Take off the carrier arm, what happens? Nothing. The adjuster arm and sash operate just the same; the sash is adjusted to any desired position and its stable equilibrium is maintained. But, take off the adjuster arm and the whole thing falls to pieces. At the same folio "100" it is also said that this carrier arm allows the window (sash) to be readily shifted from one position to another. But, is this statement correct? The shifting of the sash is unquestionably accomplished and wholly accomplished by the adjuster arm "7," which carries the sash, shifts or adjusts it to the desired position and holds it there in a state of stable equilibrium. This arm "4" can perform no function whatever in shifting the position of the window sash. It is shifted and adjusted just as well, and in the same way, and for the same purpose, with or

without it. Even the name "carrier arm" is misleading, for it carries nothing; on the contrary, it is (itself) carried by the adjuster arm "7" and the sash. Every angle, from a vertical line in the jamb to its normal position, as shown in Fig. 1, is entirely regulated by arm "7," with its slidable fixtures at "12." If you slide arm "7" down from the normal point "12"—say half way—then arm "4" takes a midway position and so on, until the lower end of arm "7" reaches the bottom of the window frame, when it assumes a vertical position in the jamb. Is it not obvious that the arm "4" is shifted and adjusted in various positions by the action of arm "7," and that arm "4" performs no function whatever in the combination described and claimed?

Claim "7" calls for a carrier arm, *supporting* said adjuster arm. This supporting function is nowhere mentioned in the description, but as a matter of fact is it true?

We assert that this carrier arm "4" gives no support whatever to the adjuster arm "7." It was never contemplated that it should act as a support to the adjuster arm or to the sash. What support can it give to the sash or adjuster arm, when the moment weight is applied to the sash, which is superior to the frictional resistance at "12," the window closes as already shown, without any reference to the arm "4"; the said arm "4" being pivotally connected to the arm "7" and the jamb at "6" cannot in our judgment give

any support either to the sash "3" of the window or to the arm "7." This suggestion is clearly demonstrated by the specifications and drawings of the Soule-Larsen patent (appearing on pages "90," "91," "92" and "93" of the transcript), which was pending in the Patent Office at the same time as the Soule patent now in controversy. The Soule of the Soule-Larsen patent is the same person as the Soule of the patent now in controversy.

In Figure "2" of the drawings of the Soule-Larsen patent you see the same adjuster arm which is at "16," fixedly connected at the lower end of the frame, and the other end is fixedly pivoted to the sash at "17." The action of this arm "16" in the Soule-Larsen patent is identically the same as the supporting arm "24" of the Hauser patent. It is constructed the same way, operates the same way and accomplishes the same result and no more and no less. Hauser's right to the use of this arrangement of the arm cannot be denied.

In Figure "1" Soule-Larsen patent you will see the sash being held in a fixed equilibrium by the arm "16," and the slidable fixtures at the upper end of the sash, while the other arm "25" hangs loosely.

At folio "120," second column, second page of the Soule-Larsen patent (page "92," Tr.), we find the following description of this arm "16":

"By the described construction, the sash swings entirely to one side of the frame; and by the frictional activity of the frictional guide and the sup-

porting action of the arm '16,' the sash is stably fixed in any position desired, without counter-weight."

The frictional guide here referred to is the guide devices at the upper end of the sash and which slide in the grooves "5" and support therein the sash in whatever position it may be adjusted (See Col. 1, second page Soule-Larsen patent). This is made still clearer by Claim "1" of the Soule-Larsen patent, which reads as follows:

"In combination with a window frame having grooves therein, a sash adapted to operate in said frame, carrier arms adapted to support the central portion of the sash, an arm connected to the sash, the said arm adapted to engage the carrier arm and lock the sash in an open position."

This arm is the little notched arm "25" shown in Fig. "1," and in many other places, which is fixedly pivoted to the sash and notched in such a manner as to engage a lug on the arm "16" (called the carrier arm in this patent) and lock and *rigidly* hold the sash in its desired position.

This Soule-Larsen patent clearly discloses that the purpose of the adjuster arm "7" in the Soule patent, with its frictional slidable devices at "12," and the so-called carrier arm "16" of the Soule-Larsen patent, with the frictional slidable guides at the upper end of the sash, perform identically the same function—that of adjusting the sash in an open position; that

they are the only features which adjust it in any desired position, and that the carrier arm "4" in one, or the notched arm "25" in the other has nothing to do with it whatever; that neither of these arms performs any function in the operation of the device; strengthens nothing; supports nothing; adjusts nothing, and has nothing whatever to do with the shifting of the sash from one position to another. Is it not obvious that adjuster arm "7" in the one and the carrier arm "16" with frictional guide in the other are the controlling operative elements of the two structures?

Again, assuming for a moment that the adjuster arm "7" of the Soule patent required some additional support or strength, we insist that any person of ordinary common sense—whether a mechanic or not—would, without the exercise of any inventive faculty, either strengthen the adjuster arm by adding more material to it, or greater resistance in its frictional devices, or by the numerous other means by which it could be strengthened or supported; the adding of any support or assistance in shifting the window which could be given by this arm certainly is not a matter requiring any invention, but solely an act of ordinary intelligence.

"The mere enlargement of parts, or the strengthening of the stable parts of a structure, or the placing of braces in the frame work in a machine

to enable it to stand up to its work is not invention”:

Schweichler vs. Levinson (147 Fed. Rep., pp. 704-707).

Brouch vs. Roemer (103 U. S., p. 797);
Star Bucket Pump Co. vs. Butler Mfg. Co.
 (198 Fed. Rep., pp. 856-863);
Barnes Co. vs. Vandyck Co. (213 Fed., p. 636);
Rose Mfg. Co. vs. Whitehouse Mfg. Co. (201
 Fed., pp. 926-928);
In re Ferres (192 O. G., p. 745).

Taking each of the elements involved, which is the only way to get down to the real questions, Hauser's supporting arm “24” is not the equivalent of the Soule arm “7,” because it is differently constructed and arranged, and it does not perform the same functions in any single respect; the fixedly pivoted arm of the Hauser patent cannot perform the functions of the slidably pivoted arm of the Soule patent. We urge this point, because it seems to us that it is, of itself, absolutely fatal to the appellant's case.

The appellant's arm “4” has no slidable frictional device and cannot slide; if it was made slidable, it would make a monstrosity; it does not in any sense lock, partially lock or retard the movement of the arm “7” or the sash, while the link of the appellees does perform these functions just detailed; they are not interchangeable, the one with or for the other;

you cannot transpose arm "4" and pivot it to Hauser's sash and supporting arm; you cannot put Hauser's frictional, slidably pivoted link to the frame of the window, as Soule does—either case would be a disastrous failure.

The difference in the structure of these two devices is accentuated by the fact hereinbefore stated, that the Soule sash has two points of slidability, to wit: at the lower end of arm "7" at "12" and at the upper end of the sash, where it is attached to the frame; while, in the appellees' structure there is but one point of slidability, affecting the adjustment of the sash to any desired position.

For these, and other reasons that will hereafter appear, we urge that Claims "1," "4" and "7" of the patent are absolutely void for want of invention. Confessedly the function of the adjuster arm "7" is to shift and support the sash in any desired position. We cannot conceive how it can be invention to increase these functions by simply adding some other increasing element.

This conclusion it seems to us is made absolutely apparent, and is the only logical result from a consideration and comparison of the two patents. It must be remembered that the Soule-Larsen patent, so-called, of which the said Soule was the real inventor, as appears from his own testimony in the transcript, was applied for October 31st, 1911, and that the Soule patent was applied for on August 21st,

1912, and that the applications for both patents were pending in the patent office at the same time. Consequently, Soule knew at the time that he made his application for the Soule patent in August, 1912, that the so-called carrier arm "16" of the Soule-Larsen patent, acting in conjunction with the slidable frictional guides connecting the sash at its upper end to the frame, permitted the sash to be shifted and stably fixed in any position desired without counterweight (See folio 120, second column, second page Soule-Larsen patent, at page "92," Tr.).

Concerning the identity of these devices Mr. Vale says:

"According to my idea, there is absolutely no difference in the device represented by one of these models; absolutely none; and any common mechanic could take one and from that build the other without any invention at all, because all the elements are present and all the functions are present and the mode of operation is practically the same. So far as the elements are concerned, the device described in the Soule-Larsen patent is the same as that described in the Soule patent. The only difference is the difference of arrangement. The two devices that are described in the Soule patent and the Larsen-Soule patent are substantially the same."

If the testimony of this expert is true as here given, how could there be any inventive skill required in adding the so-called carrier arm "4," instead of the locking arm "25"?

Again all of these claims, that is: "1," "4" and "7," are merely aggregations and not true combinations.

We contend that it is clear that the combinations, as shown in all of the claims, of a window frame, a sash in said frame, with an adjuster arm, one end of which is fixedly pivoted slightly above the middle of the sash stiles, and the other end slidably pivoted in the frame at its lower end, and one wherein the sash may be readily moved from one position to any other position, as desired, and remains in the state of stable equilibrium, in whatever position the sash may be placed, omitting entirely from the structure both the notched arm "25" of the first patent and arm "4" of the other patent constitute a window of the swinging reversible sash type.

This question of invention has been so often before the Courts that it may seem to be a waste of time and mental pabulum to collate cases on the subject. But, at the risk of criticism, we will call the attention of the Court to a few cases which we think control the subject.

We will first call the attention of the Court to the case of

Gould & Eberhardt vs. Cincinnati Shaper Co.
(194 Fed. Rep., page 680),

which was a case quite similar in principle and in the facts to the case at bar, and where at the bottom of

page "685" the Court of Appeals of the Sixth Circuit said:

"The evidence also indicates that apart from the 'self contained' features, the device in suit has utility, being especially useful where the metal to be worked is very heavy, or the thrust of the tool unusually great; and that it has been favorably received by manufacturers and users, having to a large extent taken the place of old constructions.

"It is insisted by complainant that the considerations above stated show invention, as distinguished from mere mechanical skill. Ordinarily, the mere making in one piece of a device, or part of a device, formerly made in two pieces, is not invention. But, the bringing together of previously separated parts in a unitary organization, so that they act together and produce a more beneficial result than when the parts operate separately, may be invention. But, where, as here, the elements operate in no different way, and have no different relation to each other when in a self-contained form than *when one element is detached, such combination is not invention.*"

Citing:

Standard Caster Co. vs. Caster Socket Co.

113 Fed. Rep., p. 162; 51 C. C. A., 109);

National Tube Company vs. Aiken (163 Fed.

Rep., pp. 254-261; 91 C. C. A., 114);

Herman vs. Youngstown Car Mfg. Co. (191

Fed. Rep., p. 579).

The same rule is also laid down in the very next case in the 194 Fed. Rep. *Sheffield Car Co. vs. D'Arcy*, where at page "693" it is said:

"It is, furthermore, clear that a combination of old elements, to be patentable, must produce a new force, effect or result as the product of the combined forces, as distinguished from a mere aggregation of the results of the old elements, each working out its separate effect, and that a combination consisting merely of old parts and of old results, without the addition of any new and distinct function, is not patentable."

Citing:

Reckendorfer vs. Faber (92 U. S., 347; 23 L. Ed., 719);

Goodyear Rubber Co. vs. Rubber Wheel Co. (116 Fed. Rep., pp. 363-369);

National Cash Register Co. vs. Register Co. (53 Fed. Rep., p. 371).

"This doctrine applies, not merely when the old elements are separately used in the combination, but also when they are integrally combined in one device involving mere mechanical knowledge and producing no new result differing from the aggregate result of the former separate elements."

When we consider for a moment that this patented window as a whole, or as to any of the parts of it, produces no new result and that the result (that is a reversible window sash) is old, and that Soule was in no sense a pioneer in this art, for it is a very old art, and that

such windows of various forms, shapes and construction have been in public use, as will be seen from the file wrapper of the Soule-Larsen patent on file in this Court (but not printed in the transcript by stipulation), it must be apparent that there is no new or distinct function produced by the said carrier arm "4," and that the claims in suit are for mere aggregations and not patentable.

Mechanical adaptation not invention, and is not patentable:

Dunbar vs. Meyers (94 U. S.; 24 Law Ed., 34).

Merely bringing old devices together in juxtaposition and then allowing each to work out its own effect without the production of something novel is not invention:

Pickering vs. McCullough (104 U. S., p. 318).

A patent covering a combination of old elements to produce a device new in form, but old in function, having no new mode of operation is void for want of invention:

Greist vs. Parsons (125 Fed. Rep., p. 116), and cases cited page 119.

Where the field of invention has been narrowed by many prior devices in the same art, a patent for a new combination must be narrowly construed, and limited to the precise structure shown. A

wide range of equivalents is out of the question; a broad construction of the claim is not permissible:

Kenney Mfg. Co. vs. J. L. Mott Iron Works

(137 Fed. Rep., p. 431).

(See cases cited at middle page 434.)

A patent not being a pioneer, the owner is not entitled to a broad range of equivalents. The claim must be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements or different construction and arrangement:

St. Louis Street Machine Co. vs. American

Street Machine Co. (156 Fed. Rep., p. 580),
and cases cited.

In the celebrated case of *Kokomo Fence* (189 U. S., p. 8; 47 Law Ed., p. 689; 135 Fed. Rep., p. 520), at page 531 (Fed. Rep.) it is said:

"That the patent not being a pioneer its claims must be limited in their scope to the actual combination of essential parts as shown and cannot be construed to cover other combinations of elements of different construction and arrangement."

And, agains the Court said:

"The claims of a patent covering a mere improvement upon prior machines which were capable of accomplishing the same general result must receive a narrow construction."

Citing:

Morley Machine Co. vs. Lancaster (129 U. S.,
p. 263; 32 Law Ed., p. 715).

The law is well settled as to equivalents:

“Mechanical equivalents as understood in connection with infringements of patents are such devices as were known previously, and which in the particular combination of devices specified as constituting the patented invention, can be adapted to perform the functions of those specified devices for which they are employed as substitutes without changing the inventor's idea of means: in other words, without introducing an original idea producing as the result of it an improvement which is itself a patentable invention.”

Jensen Can Filling Machine Co. vs. Norton
(67 Fed., pp. 236-239; 14 C. C. A., p. 383).

“Equivalent in the patent law means that the patent in respect to each of the respective ingredients comprising the invention covers every other ingredient which in the same arrangement of the parts will perform the same function if it was well known as a proper substitute for the one described in the patent at the date thereof.”

Norton vs. Jensen (49 Fed. Rep., pp. 859-868;
1 C. C. A., p. 452).

“It is an abuse of the term ‘equivalent’ to employ it to cover every combination or device in a machine which is used to accomplish the same result.”

Beach vs. Hobbs (92 Fed. Rep., pp. 146-150;
34 C. C. A., p. 248).

Citing:

Westinghouse vs. Boyden Power Brake Co.
 (170 U. S., p. 537; 18 Sup. Ct., p. 707; 42
 Law Ed., p. 1136);
Burr vs. Duryee (17 Law Ed. U. S., pp. 650-
 658).

In the Westinghouse case, i. d., the Court said:

“The argument that every combination of devices which is used to produce the same result is necessarily an equivalent is a flagrant abuse of the term equivalent.”

“Mechanical equivalent must be adaptable to use as a substitute for something else, and competent to perform the functions of a particular device for which it may be substituted.”

Alaska Packing Co. vs. Letson (119 Fed. Rep.,
 599).

It seems to be obvious that Soule's original conception of a reversible window is clearly described in his first patent applied for October 31st, 1911, and the device therein described, with its carrier arm “16” and its notched arm locking device, which had been made by him, and numerous of them were in public use before his application for his second patent applied for August 21st, 1912, consequently is a part of the prior art, so far as this second patent is concerned. Therefore, the second patent showing its so-called carrier arm “4” could be nothing more than a mere

carrying forward of the original conception shown in the said first patent. In cases of this kind the law is well settled that the mere carrying forward of an original conception resulting in an improvement in degree is not invention:

Keene vs. New Idea Spreader Company (231 Fed. Rep., p. 701).

Again, it is said (speaking of the patent then in use) :

“It is merely carrying forward the original conception, which Fawcett patented—a new and more extended application of it—involving change only in form, proportion or degree.”

The Supreme Court in *Smith vs. Nichols* (21 Wall., p. 112), said “that this was not such invention as would sustain a patent.”^{*} The patent was held void in the case from which the foregoing quotation is taken.

See:

Theberath vs. Rubber & Celluloid Harness Trimming Company (15 Fed. Rep., bottom p. 251).

Another important feature of the plaintiff's carrier arm “4” is found at folios “10” and “15,” first column,

second page of the patent (page 99, Tr.), which reads as follows:

"The lower part of carrier arm '4' is curved as shown in the drawing (Figs. 1 and 7). The reason for curving the end is to allow the window to close, the position of the pivot 10 being then at a point to the left of the pivot 6, and directly above pivot 11."

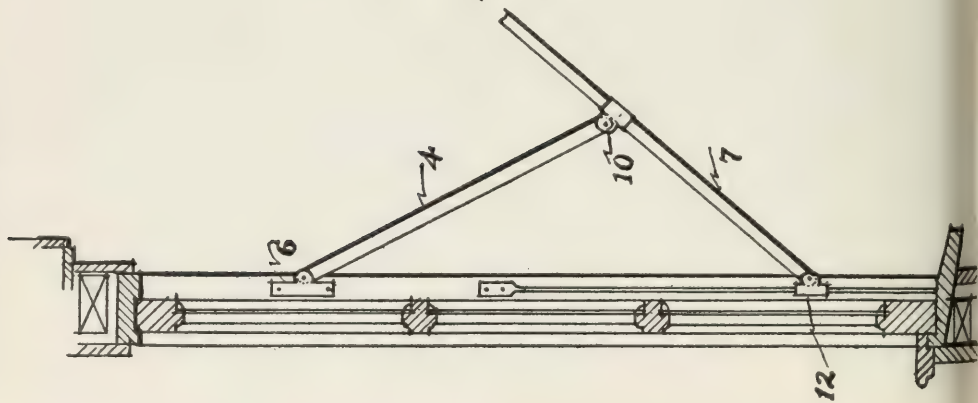
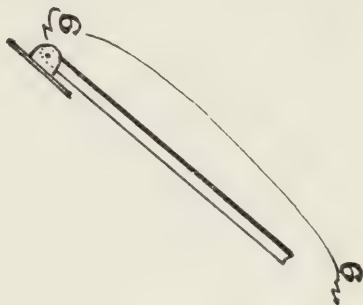
This is shown at "10" of Figure "1" of the drawings. This seems to be an important feature in the structure; it being for the purpose of allowing the window to close. Any structure that would not permit the window to close would not be a successfully operative device.

PRIOR ART.

The prior art before the Court consists in the Frot-scher patent (appellees' Exhibit "B"), also the devices designated in the record as "the awning device," the model being marked "*Defendants' Exhibit I*," and the single arm device made and sold by Hauser for many years, together with what is shown in the file wrapper of the Soule-Larsen patent.

This prior art shows adjuster arms (sometimes called supporting arms, carrier arms or their equivalents, as in Frotscher), pivotal guides of most every description and arranged in almost countless different ways, so as to operate a window sash along the lines shown in the appellant's patents. Consequently, if the

**MODEL
EXHIBIT I**



claims are good at all they are good only for the precise devices described in the claims sued upon.

FROTSCHER PATENT.

This patent shows that reversible windows were not novel at the time of the appellant's application. It shows a slidable sash, to be swung out if desired for cleaning or other purposes; it shows means for holding the sash inclined for ventilation and cleaning, so that the results to be accomplished are the same as in all of these later patented devices; the sashes are adapted to slide in the frame and are hung upon cords or chains, with weights; the cords running over a pulley arranged in the stile in any known way. While this patent is quite suggestive, we do not claim that it fully anticipates the appellant's patented device (this Frotscher patent is found at page 106, Tr.). (See testimony of Hauser, page 49, Tr.)

AWNING DEVICE.

As to the awning device, we think that discloses every feature, mechanical and structural, of the Soule device, except possibly in some very minor details of construction, which are unimportant upon the question of invention.

On the opposite page will be found a photographic drawing of this device and another showing the same structure with the sash of a window attached to it. Its

bearing upon the case is self-evident and needs no comment.

The operation of the single arm device is shown in the testimony of Vale at page 33, Tr., and also in the testimony of Hauser.

If the Court should feel disposed to go any further with the question of the prior art, we would respectfully call the attention of the Court to the file wrapper of the Soule-Larsen patent, which by stipulation was not printed, but it was agreed that the same should be used at the hearing of this cause, the same as if it had been printed.

The first application for a patent in that case contained sixteen claims—all for different structures and different arrangements of devices for reversible windows, from the single arm device upward. It appears from the file wrapper that the main desire of the applicant was to obtain a patent on some sort of a single arm device, but after four years' fight in the patent office he was driven to accept the notched arm device heretofore referred to. The patentee was familiar with all these structures and while it is not a history of the patent in suit, it is part of the evidence in this case, and has a very pertinent bearing upon the state of the art of the present patent.

We desire to call the attention of the Court to a few cases without commenting further on the subject:

In the case of *Sheffield Car Co. vs. D'Arcy* (194 Fed. Rep., 686-693), the Court said:

"A combination of old elements to be patentable must produce a new force, effect or result as the product of the combined forces as distinguished from a mere aggregation of results of the old elements, each working out its separate effects."

"When two inventors improve upon the former art, each in his own distinct and separate way, each shall be credited with his own improvement":

Duncan vs. Cincinnati, etc. (171 Fed., p. 665);

Westinghouse vs. Boyden (170 U. S., p. 537;

42 Law Ed., p. 1136).

In *Gould & Eberhardt vs. Cincinnati Shaper Co.* (194 Fed. Rep., p. 680, and cases cited), it was held:

"A combination of old elements which operate in no different way and have no different relation to each other when in combination than when one element is detached is not invention."

In *Pickering vs. McCullough* (104 U. S., p. 318) it is said:

"In a patentable combination of old elements, all the constituents must so enter into it, that each qualifies every other. It must form either a new machine of a distinct character and function; or produce a result due to the joint and co-operating action of all the elements, and which is not a mere adding together of several contributions."

“It is a familiar rule that in a patent for an improvement in an old art the claims must be limited to the precise construction or device mentioned in the claim”:

Boyd vs. Janesville, etc. (158 U. S., p. 260);
Farmers vs. Spruks Mfg. Co. (127 Fed., p.
691);

Topliff vs. Topliff (145 U. S., p. 156).

INFRINGEMENT.

It is claimed that the defendant infringes the said Soule patent by making and selling a reversible window such as shown in his patent, dated October 20th, 1914, No. 1,114,260, appearing in the transcript at pages "101," "102" and "103." There are several models of this device and various phases of it on file, but the drawings in Figure "1," page "101," Tr., disclose the structure and operation of the device so clearly that it would seem useless to refer to anything else. This structure shows an arm "24," which is pivoted to the frame at the lower end at "28" and the upper end is also pivoted to the sash, precisely as arm "16" of the Soule-Larsen patent, and holding it in position. It is evident that this arm "24" in the appellees' device of itself performs no other function than supporting the sash in whatever position it may be placed, and that it has nothing whatever to do with the shifting of the sash from one position to another, as called for by the adjuster arm "7" in the plaintiff's patent, and that said arm cannot perform any of the functions called for by the arm "7" of the plaintiff's patent. The reason is apparent: the lower end of this arm being pivoted to the frame, and the upper arm pivoted to the sash without any slidable features at either end, can act only as a mere supporting arm.

It is also claimed by the plaintiff that the link "19" of the defendant's patent is the equivalent of arm "4"

of the plaintiff's patent. This cannot be, for the reason that arm "4" is pivoted to the frame at "6" and the adjuster arm at "10," and has no slidable features in or about it whatever, while in the appellees' case the link "19" is pivoted close up to the upper end of its supporting arm "24" and *slidably pivoted* to the sash at "18," so that when the sash is to be adjusted by a change of position from a vertical to an angular line, the necessary force is applied to the sash it slides up or down at the upper end for adjustment and the link "19" slides along the slot in the sash designated as "17" for retardation. It follows from this that the link "19" performs none of the functions of arm "4" of the Soule patent.

It must be remembered, however, that this link "19" does not, on account of its slidability, or for any other reason, act as a support to the sash, or the supporting arm "24"; its only function is in the nature of a retarding device and to some extent, perhaps, retards the sash in its upward or downward movement. The only slidable feature in this patent, affecting the sash, is the same as in the Soule-Larsen patent; that is: the upper end of the sash is slidably attached to the frame and when the sash is raised or lowered it slides up or down, as the case may be. The removal of link "19" does not affect in any manner the functions of the arm "24" or the slidability of the sash.

At folio "60" of the specification of the Hauser patent, second column, first page, it is said:

"The ends of said spring 21 bear against the under side of the flat bar 8 and create sufficient friction thereagainst, to prevent the window sash moving from any position to which it has been turned. . . .

"By this construction it results that if there is sufficient friction caused by frictional engagement of the spring 18 with the slotted bar 5, said window sash will remain in any position to which it has been opened, notwithstanding that there is no direct support for said window sash."

It is obvious from this language of the Hauser patent that the sole function of this link or arm "19" is to retard the movement of the sash after it had been adjusted by the force applied to the sash; a sort of locking device, more like the notched locking arm of the Soule-Larsen patent than the arm "4" of the Soule patent.

Now, when the notched, or locking arm of the Soule-Larsen patent is removed, and the link "19" of the Hauser patent is removed, the two devices are the exact counterparts of each other, and the action of the arm "16" of the Soule-Larsen patent and arm "24" of the Hauser patent is precisely the same. So that all Hauser did was to take the carrier arm "16" of the Soule-Larsen patent and attach it to the frame and the sash in the same way.

There can be no infringement of the Soule patent by the appellees' device, for the further reasons:

Arm "24" being the exact counterpart of the carrier arm "16" of the Soule-Larsen patent, and having no slidable connection with the frame at its lower end, as the arm "7" in the Soule patent, the construction is different, the mode of operation is different, and the result accomplished by this arm "24" is wholly different. Assuming that the contention of the plaintiff is correct, which we deny, that arm "4" of the Soule patent supports arm "7" and further secures the general equilibrium desired and allows the window to be readily shifted from one position to another, it must be seen at once that link "19" performs no such functions; it has nothing to do with the general equilibrium of the device as a whole, or otherwise; it has nothing whatever to do with the shifting of the sash, nor does it have anything to do with supporting the arm "4" or the sash; it is absolutely barren of all such functions. The only thing that can be said of it is: that it is merely a retarding device which, owing to the friction that may be in the frictional device at "18," will retard the up and down motion of the sash and tend to hold it in any given position. In other words: this link "19" is more of a brake than anything else which we can compare it to. It will be observed further that you could not attach arm "4" to the sash and make it work; it would lock itself and go to smash, and this is conceded by all parties.

In order to make it work, you would have to remove the slidable device of the Soule patent at "12" and fixedly attach arm "7" to the frame at some suitable point; you would then have to put into the sash the peculiarly constructed guide and slidable fixtures shown at "18," "21" and "22" of the Hauser patent. There is no interchangeability between arm "7" of appellant's patent and arm "24," or between arm "4" and link "19," of appellees' patent, which is an important test.

Ball Bearing Co. vs. Start Ball Retainer Company (147 Fed., p. 721).

Suppose this suit was by Hauser against the appellant, could it be said that arm "7" was the same as arm "24," or that arm "4" was the same as arm or link "19"?

APPELLEES' PATENT.

It is conceded that the appellees have made and sold devices according to the description contained in said Hauser patent No. 1,114,260, dated October 20th, 1914. It is, of course, a junior patent, being later in date than the Soule patent. This fact, together with what has already been said, it would seem to us, should justify the Court in affirming the judgment below.

The Supreme Court in the case of *Corning vs. Burden* (15 How., 265) said:

“It is not easy to perceive why the defendant who uses a patented machine should not have the benefit of a like presumption in his favor, arising from a like investigation of the originality of his invention, and the judgment of the public officers that his machine is new, and not an infringement of the patent previously granted to the plaintiff.”

While there are many decisions affirming the rule here laid down, we will not cite them any further, because this Court is familiar with the rule, as this quotation is taken from the case of *Ransome et al. vs. Hyatt* (69 Fed. Rep., p. 148), the opinion in said case being written by His Honor, Judge Gilbert. With this presumption in our favor, we can see no reason why the judgment should be reversed.

APPELLANT'S BRIEF.

The appellant relies for its hope of reversal upon one sole legal proposition, which we admit to be good law in those cases where it applies; the proposition relied upon is stated in the first five lines of Section 348, *Walker on Patents*, and for the convenience of the Court we will reproduce that portion of it copied in the appellant's brief, to wit:

“Changing the relative position of the parts of a machine or manufacture does not avert infringement, where the parts transposed perform the same respective functions after the change as before.”

But, counsel failed to quote the whole of the rule stated in that section. The next paragraph of the section reads as follows:

“But changing the relative positions of the parts of a machine does avert infringement, where the changing of those positions so changes the functions of the parts, that the machine acquires a substantially different mode of operation, even though the result of the machine remains the same. A suit for infringement cannot be sustained against him who makes, uses, or sells a substantially different combination, even though it includes exactly the same ingredients as those claimed in combination by the patent in suit. The owner of a patent for a combination cannot suppress a newer, better and substantially different combination of the same ingredients.”

Our contention is that the rule stated in this last part of the section clearly controls this case. As we view it, it is not a question of the changing of the relative position of the parts but a question of the re-arrangement and re-construction of the whole machine.

Take arm “7” of the one and arm “24” of the other; no change in the position of these arms has taken place; but, they are entirely reconstructed and rearranged, owing to the fact of the slidable frictional connections of 7 and the omission of these devices from arm “24.” There must necessarily be a change in function and mode of operation between a rigidly pivoted arm and a slidable pivoted arm which performs a certain function that the other arm

cannot perform. Of course, the same thing may be said of arm "4" and link "19."

The appellee Hauser, under his patent, has made and sold devices of a substantially different combination. Even though we admit, which we deny, that the two devices include the same ingredients, for reasons which we think have already been made apparent; and we contend further that the Hauser device is entirely and substantially a different combination of the ingredients, even though they should be held to be the same.

The footnotes to the foregoing section cite many cases in support of the rule, but it is so well known and so well established that we do not think it necessary to comment upon them.

Mr. Miller cites and comments upon several cases in his brief, sustaining and illustrating the rule contended for by him—some of them are very old cases, but so far as we can see throw no light upon the proposition.

It must be remembered that Soule accomplished no new result whatever, but he accomplished an old result in a way slightly different in the mechanical construction from what preceded him, which differences we contend were all within the range of mechanics and did not involve invention.

Soule, at least by the patent in suit, was not the first to discover or apply the idea of a slidable or

reversible window sash; he did not discover or invent the idea of having the sash slidable at the top; he did not discover or invent the idea of an adjuster or supporting arm; he did not discover or invent the idea of having a supporting arm slidably connected with the frame at the bottom; he did not discover or invent the idea of having a carrier arm; he did discover that these ingredients combined in the way he described would produce a reversible window sash. If he invented anything, which we say he did not, it was simply the specific construction and arrangement of his adjuster arm and carrier arm as described in the specification, which we do not use. Hence, according to our view, none of the cases cited by counsel for appellant cover the point.

Mr. Miller cites *Ives vs. Hamilton* (92 U. S., p. 426; 23 Law Ed., p. 494), which he calls a *conclusive citation*. We have carefully examined this case and we cannot find anything in it that is any broader or any more applicable to the case at bar than the text of the rule invoked by the appellant, to wit: that the mere changing of a *position* of an element in a machine does not avert infringement, where the parts transposed perform the same function after the change as before. In the *Ives* case the Court simply found as a fact, that the pivoting of the lower end of the saw, below the cross-head, instead of above it, did not affect the operation of the machine; that is to say: that

whether the element, to wit: the saw, was pivoted to the pitman above or below the cross-head was not a material change in any sense. We say that, in our judgment, this law cannot be applied to the arms "7" and "24" or "4," and the link "19" in the second device. They are differently constructed, arranged differently, operate differently; they do not perform the same functions, notwithstanding all of them accomplish the same old result of making a reversible window sash, which brings the case directly within that portion of Section 348 of *Walker on Patents*, which we have quoted. The Hauser device is a newer and better, and substantially a different combination of ingredients and elements.

In view of the fact that Judge Rudkin in his decree in dismissing the bill (page 17, Tr.), states that he had considered all of the evidence produced at the trial, we think the apology offered by counsel for appellant, for Judge Rudkin's decision in the case, is not called for. As a matter of fact, Judge Rudkin gave very careful attention to the evidence and remarks and discussions that arose at the trial and thoroughly understood the theory of the plaintiff and the defendants. It is true that Judge Rudkin did not pass specifically upon the question of invention, which he doubtless held to be unnecessary, in view of the fact that in his judgment there was no infringement of either of the patents sued on. The importance of

the case to the appellee Hauser, who was acting in good faith under his junior patent, must be our excuse for the very detailed discussion by us of the questions involved.

All of which is respectfully submitted.

SCRIVNER & HETTMAN,
Attorneys for Appellees.

No. 3004

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SIMPLEX WINDOW COMPANY,

Appellant,

VS.

HAUSER REVERSIBLE WINDOW COMPANY et al.,

Appellees.

APPELLANT'S REPLY BRIEF.

JOHN H. MILLER,

Attorney for Appellant.

FILED

OCT 22 1917

U. S. DEPT. OF JUSTICE
RECORDS SECTION

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SIMPLEX WINDOW COMPANY,

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APPELLANT'S REPLY BRIEF.

Appellees begin their brief by saying that two questions are involved on the appeal, viz.:

1. *Validity of the claims of the patent in suit;*
and
2. *Infringement of said claims.*

We most emphatically deny that the validity of the patent is involved on this appeal, and assert that the only question involved is that of infringement.

In the answer which was filed by the defendant, in the lower court, the validity of the patent was not denied. On the contrary due issuance of the patent was admitted and a general assertion was made in substance that the defendants did not know any-

thing about the validity of the patent and called upon plaintiff to make proof in that behalf. Plaintiff did make proof by offering in evidence the duly issued patent, which carried with it the presumption of validity, and no evidence was offered by defendants in contravention thereof. No prior patent or prior use or prior invention of any kind was pleaded, and consequently none such could have been offered in evidence.

Furthermore, the lower court held inferentially that the patent was valid and based its decision solely on the ground of non-infringement.

In these circumstances it is preposterous for the appellees to assert that the validity of the patent is in issue on this appeal. Nevertheless they present an extended argument to the effect that the patent is void for want of invention, patentable novelty, and aggregation. Those matters are not germane to any issue before this court, and consequently we shall not waste time in attempting to answer them. It is too late to advance such arguments. We repeat that the sole and only question before this court is that of infringement, and we come here with a valid patent, unattacked by any pleading, practically conceded by the appellees at the trial, and inferentially adjudicated by the lower court.

PRIOR ART.

Under this head appellees call attention to three matters, viz.:

1. *Frotscher patent*;
2. *The awning device*; and
3. *The Soule and Larsen patent*.

As to the Frotscher patent little remains to be said. It is a wholly different thing from anything shown in the patent in suit. It is represented by Defendants' Model Exhibit B, and all the court has to do in testing our assertion is to examine the model. As we pointed out in our opening brief (page 11) defendant Fred Hauser testified that this Frotscher device was a wholly useless and worthless contrivance. That testimony disposes of the exhibit in question.

AWNING DEVICE.

This device is referred to by appellees at pages 23 et seq. of their brief. Purported cuts of the same as applied to windows are represented opposite page 23. The first cut is not truly representative of the old awning device as used in practice. Your Honors can see this if you will examine one of these awning devices the next time you walk down Market Street. This cut is purely fictitious, and the model (Defendants' Exhibit I) from which it is supposed to be made is faked. Neither the model nor the drawing is a correct representation of the old awning device. The testimony of the witness Vale in substantiation of this statement will be found at pages 55 et seq. of the record, and substantially similar testimony by the defendants' witness Behnke

will be found at pages 64 et seq. of the record. We submit, therefore, that this cut and this model must be entirely disregarded.

But furthermore, the cut itself, even as made, is not capable of the functions performed by the Soule patent. The structure of the cut is not reversible, nor is it capable of being held in stable equilibrium at any desired point. These are the two functions of the Soule window. They are not found in the awning structure. In the old awning structure when the cord or latch which holds the awning folded up against the window is released, the awning falls down to its extreme limit by gravity, the lower rod extending out horizontally from the window, and there rests in that one stable position until it is folded up again. It can not be automatically manipulated so as to be held in any other position of stable equilibrium, and the only way that such result can be accomplished is to manually bring it into such a position, and then manually tie or latch it there, which, of course, is a different mode of operation from that of the Soule window.

Nor is the awning capable of reversibility. Indeed there would be no occasion to reverse it, even if one desired to do so. Its mode of use is to be folded out completely when in operation, and to be folded up completely when out of operation. No reversibility is desirable or possible. With the window, reversibility is desirable for the purpose of enabling the operator to wash the glass. Thus we see that the object to be accomplished and the

mode of operation are both different in the two cases.

Referring to the second cut shown opposite page 23 of the appellees' brief, that is stated to be an "awning device attached to the sash". But that is purely a hypothetical and visionary figure. Appellees use it for the purpose of showing how they think the old awning device could be applied to a window for the purpose of reversing the sash and holding it in stable equilibrium at any desired point. What we have said regarding cut 1 applies with even greater force to cut 2. We repeat, both cuts are visionary and fictitious. Neither one represents any actual structure of the prior art. Therefore, they should be disregarded.

The model and drawing have been purposely made to vary from the actual awning structure of the prior art in order to simulate the Soule window structure. Note the fact that in the drawing the lower end of arm 7 has been carried down to the bottom of the window and there provided with a sliding mechanism. No such construction was ever shown anywhere in an awning. Note, also, the fact that this arm 7 is shown as inclined at an angle of 45° , similar to Soule; whereas in the actual awning this arm 7 extends outward on a horizontal. Soule's arm could not under any conceivable condition of operation assume the horizontal position.

Note, also, the fact that in the drawing the upper end of the arm 7 is provided with a pivot 9. No such pivot is found in an awning, nor is there

any necessity for one at that point. One edge of the cloth is permanently attached to the arm at that point, and the other edge to the window so that the awning will fold and unfold like an umbrella. Indeed, the awning is no nearer to Soule's window structure than an ordinary umbrella.

But whatever the awning structure may be, we insist that at this stage of the controversy it cannot be used to impeach the patent. The question of validity of the patent is not before the court. The only question before the court is that of infringement upon the patent, and that necessarily concedes validity.

SOULE & LARSEN PATENT.

Appellees profess to rely upon the Soule & Larsen patent as a prior device and a part of the prior art, arguing therefrom that its effect is to invalidate the patent in suit. In reply we assert that the Soule & Larsen patent is no part of the prior art and can not be used for any such purpose as that for which the appellees use it. That patent was applied for on October 31, 1911. The Soule patent in suit was applied for on August 21, 1912, and was issued on September 9, 1913, whereas the Soule & Larsen patent was not issued until two years afterwards, on November 9, 1915. The two patents were co-pending applications in the U. S. Patent Office. Consequently, the Soule & Larsen patent is not a prior patent, nor is it any part of the prior art.

Co-pending applications by the same inventor, no matter which was filed first, can not be used to anticipate or avoid each other. This was decided by the Court of Appeals for the Eighth Circuit in *Century Electric Co. v. Westinghouse*, 191 Fed. 350, and at page 352 of the Reporter many cases are cited in support of the decision.

It is well settled that where the alleged prior patent was filed before, but was not issued until after, the issuance of the patent in suit, such alleged prior patent is not anticipatory.

General Electric Co. v. Allis, 190 Fed. 166;

Box Co. v. Gumb, 231 Fed. 274;

Bates v. Coe, 98 U. S. 31;

Dubois v. Kirk, 158 U. S. 64.

And the courts have even gone so far as to hold that the alleged prior patent is not anticipatory even though it was actually issued prior to the issuance of the patent in suit, so long as the patent in suit was co-pending with the other patent in the Patent Office, prior to the issuance of either of them.

Vacuum Co. v. Dunn, 209 Fed. 221;

Gray v. Baird Mfg. Co., 174 Fed. 417;

Anderson v. Collins, 122 Fed. 451.

Furthermore, the witness Soule testified that he made the invention of the Soule patent in the beginning of 1911 (Rec. 44). Now, inasmuch as the Soule & Larsen patent was not applied for until October 31, 1911, it is apparent that the invention of

the Soule patent was as a matter of fact actually made many months prior to the application for the Soule & Larsen patent. For that reason, if for none other, the Soule & Larsen patent could not be considered as an anticipatory patent or as a part of the prior art. Consequently, the Soule & Larsen patent cuts no figure in this controversy and must be wholly eliminated from consideration.

But furthermore, the invention of the Soule & Larsen patent, if it be an invention, is wholly different from that of the Soule patent. In the Soule & Larsen patent it is true that there is shown an adjuster arm, designated by the numeral 16 in the drawing, but the only way in which that adjuster arm can operate to maintain the window frame in stable equilibrium is by the use of another arm attached to the window sash and provided with notches to engage a lug placed on the adjuster arm. The operation is that of a positive, permanent locking device, similar to a gate latch. When the notch engages the lug, the window frame is locked. This requires a manual operation. The operator must first open the window to the point where he desires it to be held and then manually engage the notched arm with the lug. The window then remains permanently in that position just as a door or gate when it is locked. To change the position the operator must unlock the device and move the window to another position, and then again manually lock it. There is no automatic operation, but

purely a manual one of successive locking and unlocking, latching and unlatching.

But in the case of Soule's window, all that is necessary to do is to push the window open to the desired position and leave it there. The retention of the window in that position is automatic. It was for these reasons that we acquiesced in the ruling of the lower court regarding the Soule & Larsen patent. The distinction between the two devices is apparent. The Soule & Larsen device is a manual lock: the Soule device is an automatically-operated device for holding the window in any desired position against ordinary strains. Automatic mechanism is not an equivalent of manually-operated mechanism. *E. N. Rowell Co. v. William Koehl Co.*, 240 Fed. Rep. 956-61; *Hobbs v. Beach*, 180 U. S. 390 et seq.

APPELLEES' PATENT.

Defendant Hauser secured a patent, No. 1,114,260, dated October 20, 1914, some two years after the application of Soule for his patent, and a year after the actual issuance of the Soule patent. The structure of defendants' window is that shown in this Hauser patent.

Appellees seek to invoke some kind of a presumption which they say arises from the issuance of this subsequent patent. Their precise contention is that the issuance of this subsequent patent raises a presumption that the structure therein shown is not

an infringement of any prior patent. In reply to this we say that there is no such presumption under the law. The only presumption which arises on the issuance of a subsequent patent is that the claims of the subsequent patent are not anticipated by any prior patent. Or, to put it in a little different language, that there is *a patentable difference* between the claims of the subsequent patent and any prior structure. *There is no presumption whatever that the structure described in the subsequent patent is not an infringement of any prior patent.*

The latest case on this subject is that of *General Electric Co. v. Electric Controller Co.*, 243 Fed. 188, decided by the Court of Appeals for the Sixth Circuit, on May 18, 1917. From page 193 of the opinion we read:

“In this connection it is to be observed that the defendant has a patent upon its form of device and insists upon the benefit of some presumptions from this patent. We do not need to repeat that the issue of the later patent raises no presumption of non-infringement, and usually does not even tend to establish that conclusion. The contrary claim confuses the presumption of patentable difference with the presumption of non-infringement.”

In support of this the court cites the cases of *Herman v. Youngstown*, 191 Fed. 584; and *Curry v. Union Co.*, 230 Fed. 429.

In addition thereto we cite the cases of *Murray v. Detroit*. 206 Fed. 467;
Rowley v. Columbus, 220 Fed. 128, 137.

The appellees cite in this behalf the decision of this court in the case of *Ransome v. Hyatt*, 69 Fed. 148; but the only thing the court decided there is that the issuance of a subsequent patent "creates a *prima facie* presumption of a patentable difference from the machine of the complainant's patent". This is far from holding that the subsequent patent raises a presumption of non-infringement. Indeed, the Ransome case is in direct harmony with the rule laid down in the cases we have cited, and that is that the subsequent patent merely raises a presumption that its *claims* possess a patentable difference over prior devices. It is elementary law that a subsequent device may be patentable and yet may be an infringement of an antecedent patent. That is all that we have here. The issuance of the Hauser patent creates a presumption that there was something patentable in his construction, but it does not create any presumption that said construction was not an infringement of the Soule patent.

This question is one which has created some confusion at times by reason of the loose language used in some of the decisions, but when it is carefully analyzed it will be found to be free from doubt, and the law on the subject is as we have above stated.

INFRINGEMENT.

This is the sole and only question involved on this appeal. We base our contention of infringement

on the rule stated at Sec. 348 of *Walker on Patents* and a great number of cases upholding that citation. The rule is simply this:

Changing the relative position of one or more of the elements of a machine does not avert infringement where the transposition does not effect a new result or embody a new mode of operation.

Of course the corollary from this rule follows that where the transposition does effect a new result or embodies a different mode of operation, then the rule does not apply.

Therefore, the questions for consideration here are: (1) Is there any different result accomplished by the Hauser structure? and (2) Is there any difference in the mode of operation?

It goes without saying that the first question must be answered in the negative. There is no difference in result. Both structures accomplish identically the same thing, to wit, (1) reversibility of the window for the purpose of washing, and (2) retention of the window in stable equilibrium at any desired point to resist ordinary strains from which it would otherwise be closed up.

The second question also must be answered in the negative. The two windows operate on the same principle and by the same mode of operation. The sole and only difference in mechanical construction is this: that whereas in the Soule window the lower end of the adjuster arm is slidably pivoted in the frame, and the outer end of the carrier arm rigidly

pivoted therein, in the Hauser structure the lower end of the adjuster arm is rigidly pivoted in the frame, and the upper end of the carrier arm slidably pivoted in the sash. This is merely a reversal of parts. Both structures have the same elements, to wit, adjuster arm, carrier arm, and sliding mechanism used in connection therewith. It is wholly immaterial whether the sliding mechanism be located in the frame or the sash. Soule locates it in the frame, Hauser locates it in the sash. This is a mere change of location. No new result is accomplished. Both devices accomplish identically the same result and by the same mode of operation. They are therefore mechanical equivalents. This presents the entire controversy in a nutshell, and no argument could change the facts. It is a plain, simple case for application of the well settled rule of law quoted. Does that rule apply, or does it not apply? If it does apply, then there was an infringement, and the judgment must be reversed.

Counsel for appellees say that as they view the matter it is not a question of changing the relative position of the parts of the machine, but of *re-arrangement* and *re-construction* of the whole machine. This is begging the question. We admit that there is a re-arrangement in certain minor particulars; but that does not avoid infringement, because the further question then remains, does such re-arrangement result in any different function or any changed mode of operation? It can not be denied that the result is the same, and as to the

mode of operation we contend that there is substantial equivalency. Certainly both windows are reversible. That can not be denied. It is equally certain that both windows can be held in stable equilibrium at any desired point against ordinary strains and thereby be prevented from closing up. It is equally certain that this is accomplished by the use of the adjuster arm, carrier arm, and sliding mechanism, and the only difference is as to the location of certain of the parts. In fine, the only difference is that in the Soule structure the sliding mechanism is located in the frame, whereas in the Hauser structure the sliding mechanism is located in the sash. This change of position in the sliding mechanism necessitates a change in pivoting. That is to say, the sliding pivoting of the adjuster arm in the Soule is changed to a rigid pivoting, and the rigid pivoting of his carrier arm is changed to a sliding pivoting, all without producing the slightest change in result. Is not that equivalency?

This question is further answered by Plaintiff's Exhibit No. 6, which is a model of a window provided on one side with the Soule mechanism, and on the other side with the Hauser mechanism. Both sides work in perfect harmony. Where one device can be substituted for another without change of function, it is an equivalent. In other words, interchangeability of two elements betokens equivalency.

Ball Bearing Co. v. Star Co., 147 Fed. 721
(affirmed in 149 Fed. 219).

In closing, we can not refrain from calling attention to many errors both of fact and theory contained in the appellees' brief.

At the top of page 4 it is said that the force which holds the adjuster arm and sash in a fixed stable position is "the frictional force of the slidable devices in the slot at 12". This is an error. There is no frictional force at the point 12 of the Soule patent other than such frictional force as would naturally follow a freely flowing slide. According to the patent 12 is a sliding block moving freely up and down in the slot 20, and there is no device provided at that point to secure frictional resistance. The frictional resistance of the Soule device which holds the window in any desired position, is at the top part of the frame where the upper end of the sash is provided with a device for the purpose of obtaining frictional resistance.

Again, at the bottom of page 4 and top of page 5 appellees repeat the error by asserting that the frictional devices at 12 are "amply sufficient to hold the sash in stable equilibrium for all practical and useful purposes". This is wholly erroneous, more so even than the former statement. The devices at 12 consists of a freely sliding block, and the essence of its construction is that it should be freely sliding and not capable of offering resistance.

Near the middle of page 6, it is stated that the carrier arm 4 is wholly controlled by the adjuster arm 7. The reverse of this is true. The adjuster arm 7 is controlled by the carrier arm 4.

At the top of page 7 it is stated that the name "carrier arm" as applied to Soule's arm 4 is misleading in that it carries nothing, but is carried by the adjuster arm 7. This is not a correct statement. On the contrary the arm 4 is rigidly attached at its upper end to the window frame and at the other end to the adjuster arm, and the adjuster arm in turn is attached to the sash. Consequently, the arm 4 supports or "carries" both the adjuster arm and the sash, and in the true sense of the term is a "carrier arm". But what of it, if the term "carrier arm" is a misnomer? The patent law deals with things and the functions of things, not merely with the names of things, and if a patentee should be so unfortunate as to misname one of the elements of his machine, the matter is of no consequence as affecting the validity of the patent.

At page 28, when referring to the Hauser patent, it is asserted that the Hauser link 19 does not act to support the sash or the adjuster arm 24; but this statement is immediately contradicted by the brief when it proceeds to say that the only function of the link 19 is in the nature of a retarding device "and to some extent, perhaps, retards the sash in its upward or downward movement".

At the middle of page 29, it is asserted that Hauser's link 19 is "a sort of locking device, more like the notched locking arm of the Soule-Larsen patent than the arm 4 of the Soule patent". This is not correct. The notched arm of the Soule-Larsen patent is that of a positive, absolute lock. No such

function inheres in Hauser's link 19. On the contrary the link 19 acts in the same capacity as Soule's arm 4 and divides the weight of the sash.

At the middle of page 30 it is asserted that Hauser's link 19 has nothing to do with the general equilibrium of the device nor with the shifting of the sash, nor with the supporting of the adjuster arm or sash. This is entirely inaccurate. It has a great deal to do with all of the things mentioned. In proof of that remove the link 19 entirely and the device becomes impractical and does not perform the function it was intended to perform.

At page 31, it is asserted that there is no interchangeability between arm 7 of Soule's patent and the arm 24 of Hauser, nor between arm 4 of Soule's patent and link 19 of Hauser. This is likewise erroneous, and in proof of the same we have merely to refer to the Plaintiff's Exhibit 6, which consists of a Soule window, on one side of which the Soule patented structure has been removed and Hauser's structure substituted, while the other side retains the Soule structure. In other words, on one side of the window there is that "interchangeability" which counsel says is an important test of equivalency.

At page 35, it is asserted that Soule did not discover or invent the idea of having a supporting arm slidably connected with the frame at the bottom nor the idea of having a carrier arm. We most emphatically deny these assertions. He did discover and invent the things mentioned, and he was the

first in the art to produce them. Hauser gives to these things the tribute of his praise by using them or their mechanical equivalents.

We submit that the judgment is erroneous and should be reversed.

Dated, San Francisco,
October 20, 1917.

JOHN H. MILLER,
Attorney for Appellant.

No. 3004.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

THE SIMPLEX WINDOW COMPANY, a Corporation,
Appellant,

vs.

HAUSER REVERSIBLE WINDOW COMPANY, a Corporation, FRED HAUSER and JESSIE HAUSER,
Appellees.

PETITION FOR REHEARING

SCRIVNER & HETTMAN,
Attorneys for Defendants.

Filed this.....day of March, A. D. 1918.

F. D. MONCKTON, Clerk,

By.....Deputy Clerk.

The James H. Barry Co., San Francisco.

FILED

MAR 5 - 1918

F. D. MONCKTON

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

THE SIMPLEX WINDOW COM- PANY, a Corporation,	} <i>Appellant,</i>	} No. 3004
vs.		
HAUSER REVERSIBLE WINDOW COMPANY, a Corporation, FRED HAUSER and JESSIE HAUSER,	} <i>Appellees.</i>	

PETITION FOR REHEARING.

*To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:*

Now come the defendants and appellees, Hauser Reversible Window Company, et al., and believing and therefore respectfully representing that the Court has been led to an erroneous conclusion in its decision entered and filed herein on the 11th day of February, 1918, by inadvertently overlooking and misapprehending the actual construction and operation of the re-

spective devices of the appellants and appellees, and in not applying the proper limitations to the claims of the appellant's patent sued upon herein, and in holding that the claims of the appellant's patent were entitled to a broad application of the doctrine of equivalents, and for other errors appearing in the said opinion of the Court, and file their petition for a rehearing for the purpose of having the record again considered.

The petitioners respectfully pray that the cause may be restored to the calendar for a rehearing and may be reheard upon oral arguments and printed briefs in order that injustice may not be done.

Respectfully submitted.

HAUSER REVERSIBLE WINDOW
CO., ET AL.,

Defendants and Appellees.

By SCRIVNER & HETTMAN,

Their Counsel.

I hereby certify that in my judgment the above petition for rehearing is well founded in point of law, is not interposed for purposes of delay, and ought to be granted.

J. J. SCRIVNER,
Attorney for Appellees.

BRIEF ON PETITION FOR REHEARING.

On page "4" of the typewritten copy of the opinion rendered herein, the Court said:

"One thing is manifest from that portion of the specification above quoted, which is, that the Soule invention was but an improved window of the character therein specified, namely: 'windows of the swinging, reversible type'; for such is the inventor's express declaration. There is, therefore, no ground for the appellant's contention that reversible windows were new before the Soule invention."

And, on page "7" of said opinion the Court further said:

"As we understand the Soule device, it is an automatically operating one for holding the window in any desired position, and while his patent cannot, in our opinion, be properly regarded as a pioneer one in any sense, we think the improvement invented by the appellant's assignor marks such a distinct advance in the art over anything theretofore existing, so far as has been shown, as entitles the patent to the protection of the doctrine of equivalency in proportion to such advance";

And, on page "8" of said opinion, in an effort to compare the Soule device with the Hauser device, the Court said:

"each has an adjuster arm, a carrier arm, and a sliding mechanism in connection therewith by which the same result is attained—the chief difference being that in the Soule device the lower end of the adjuster arm is slidably pivoted in the

window frame and its outer end rigidly pivoted therein, whereas in the Hauser device the lower end of the adjuster arm is rigidly pivoted in the window frame, *and its upper end slidably pivoted in the window sash by means of the link numbered 19.* In other words, in the one, the sliding mechanism is located in the window frame, and in the other in the window sash."

From these and other expressions in the opinion, we are led to believe that the Court did not fully comprehend the structure or mode of operation involved in the two devices. It may be that we were at fault in not giving a more detailed description of the construction of these two devices, for they are certainly radically different.

In all the preliminary paragraphs which describe in general terms the nature of the Soule invention, the inventor speaks of carrier arms as being an essential part of his invention. These carrier arms numbered "4" in his drawing are pivoted in the upper end to plates secured to the sides of the window frame and hang downwardly therefrom. From the lower ends of these carrier arms are suspended pivoted adjuster arms "7," one end of each of which slides in a groove in the window frame, while the other end is fixedly pivoted to a side of the window sash.

Now, as contradistinguished from this structure, the Hauser structure appears to us to be entirely different, for it clearly appears that the sash is *supported*, not *suspended* upon the upper ends of arms which extend upwardly and are supported at their lower ends

to sides of the window frame, the upper ends of said arms being fixedly pivoted to the window sash. The other arm of the Hauser device, if you will call it an arm (Hauser calls it a link "19"), instead of being pivoted to the supporting arms at points intermediate of the ends, as are the adjusting arms of Soule, but are pivoted thereto at their lower ends, and at the upper ends can slide in grooves in the sides of the window sash.

Thus, it will be seen that there are several important structural differences between the Soule device and the Hauser device, to-wit:

(1) In the Soule device, the sash is connected to the window frame by a *double* folding connection, *the adjuster arms* and *the carrier arms*; while, in the Hauser device the sash is connected to the window frame solely by *one* arm, namely arm "24";

(2) The center of the Soule sash is always *below* the support on the window frame; while that of Hauser is always *above*;

(3) The Soule device has three parts engaging each side of the window frame, to-wit: the sash, arm "4", and arm "7"; while the Hauser has only two parts engaging the window frame, to-wit: *the sash, and arm "24"*;

(4) The Soule has two parts slidable in grooves in the window frame, to-wit: "12" and "16"; the Hauser has only one, to-wit: the block "3" at the upper end of the sash.

From this concrete analysis of the structure it must be apparent that the construction of the two devices is radically different.

In our opinion it would be very unusual if structures so wholly different in their details of construction should operate in the same way, although they produced the same common results. Of course, we need not stop to call the attention of the Court to the well known rule of law, that patents are granted for the structure, the mechanism or elements which, in combination with each other, produce a result, and not for the results or the mode of operation. In other words: in the case at bar, while the common results are substantially the same, such a vast difference in the structure and the combination of devices making them up, would almost necessarily lead to a different mode of operation. This is especially so, when it is conceded that the art of swinging reversible window frames is an old art and that both Soule and Hauser are mere improvers in the same old art.

The frictional resistance in the Soule device which holds the window in any desired position is at the top part of the frame, where the upper end of the sash is provided with a device for the purpose of obtaining frictional resistance (see Mr. Miller's brief near middle page 15). While in the Hauser device the only frictional resistance which holds the window in any desired position is the frictional devices controlling the movement and action of arm "19," and in the Hauser device the upper end of the sash is only slidably connected with the sash without any frictional resistance (see Hauser patent, col. 2, page 1, folio 80). In other words, Soule holds his sash in

any desired position by means of the frictional device arranged in the upper end of his sash and connected by suitable means to the frame; Hauser holds his sash in any given position by means of frictional contact of one end of arm "19" with the sash, as shown at folio 85, second column, page 1 of the Hauser patent, and figures 18, 21 and 22, Fig. 1 of the drawings. We urge that there is a wide distinction between having the sash slidably and frictionally pivoted in the frame to hold the sash in any desired position, as in Soule, and having the carrier arm or link "19" of the Hauser frictionally and slidably attached to the side of the sash itself to accomplish the same function; that is, holding the sash in any desired position. This very difference in construction we insist necessarily involves a clear and well defined difference in the mode of operation of the two devices.

At this point we desire to respectfully call the attention of the Court to a statement in the opinion, where it is said:

"The chief difference being that in the Soule device the lower end of the adjuster arm is slidably pivoted in the window frame and the outer end rigidly pivoted *therein*. Whereas, in the Hauser device the lower end of the device is rigidly pivoted in the window frame and the upper end slidably pivoted in the window sash by means of the link 19."

With all due respect to the Court, we must insist that so far as the statement attempts to describe the

construction and operation of the adjuster arm "24" in the Hauser device, it is in our opinion fatally erroneous. There are several minor objections to this statement to which we will simply call the attention of the Court before we take up the serious and, as we think, fatal one.

We are at a loss to understand what the Court meant, in speaking of the Soule device, by the expression:

"The lower end of the adjuster arm is slidably pivoted in the window frame and its outer end rigidly pivoted therein."

If the word "therein" means that the outer end of the arm was pivoted in the window frame, of course it is meaningless, for it would be impossible to pivot both ends of the arm in the window frame. Then, again we object to the use of the word "rigidly," as being incorrect: none of these arms are pivoted rigidly at any point; if they were, they could not move in any direction; they are simply fixedly pivoted so they can swing from a fixed point like the pendulum of a clock. The fatal objection to this statement, however, rests in the expression (in speaking of the Hauser device) that the lower end of the device (presumably meaning the arm "24") is rigidly pivoted in the window frame and the upper end slidably pivoted in the window sash. With all due respect to the Court, we must insist that, so far as this statement attempts to describe the construction and operation of the adjuster arm

"24" in the Hauser device, it is fatally erroneous. It is true that the lower end of the adjuster arm "24" of the Hauser device is fixedly (not rigidly) pivoted in the window frame, but it is not true that the upper end is slidably pivoted in the window sash, with anything, or by any means whatever, or at all. The upper end of this arm does not slide in any direction or for any purpose. It would be fatal to the operation of the Hauser device if the upper end of his arm "24" would slide in any direction. It swings exactly as the upper end of the Soule arm "7" and exactly as the arm "16" in the Soule-Larsen patent.

If the Court will take the trouble to look at the Soule-Larsen patent, on pages 90 and 91 of the transcript, it will be readily seen that arm "16" of this device is the precise counterpart in structure and in its means and method of attachment to the frame and sash, and its functions and mode of operation are precisely the same as the arm "24" of the Hauser patent; that is to say, one end of the Hauser arm "24" is fixedly attached to the frame and the other or upper end fixedly, not slidably, pivoted to the sash, as at figure 26 in the drawings, and in the Hauser patent at fol. 70, where it is said (referring to this arm):

"of which the lower end is pivoted, as shown at 26, to the lower end of the slotted portion of the bar 8."

It is difficult for us to understand how the Court could have gotten the idea that the upper end of the Hauser arm "24" was in any sense, or for any purpose,

slidably attached to the sash. If the Court will only look at the drawings and reflect for one moment, it will be clearly seen that such a construction would be absolutely inoperative. With arm "19" sliding at the upper end and the upper end of the arm "24" sliding in the same direction, what could result from such an operation? A complete collapse. Certainly the arm "19" could not perform the function called for in the specifications of the patent, where it is said, at folio 65:

"The ends of said spring 21 bear against the under side of the flat bar 8 and create sufficient friction thereagainst, to prevent the window sash moving from any position to which it has been turned. The other end of said link is pivoted, as shown at 23, to a mediate point of an arm 24, of which one end is pivoted, as shown at 26, to the lower end of the slotted portion of the bar 8, etc."

It is indeed absolutely necessary that the upper end of the arm "24" of the Hauser device be fixedly pivoted to the sash, in order that the lower end of arm "19" have something to hold its lower end in a fixed position, in order to hold the sash in any desired position.

It seems to us that this is so apparent that it ought not to require any argument to demonstrate it. Neither Mr. Soule, nor his counsel, attempt to make any such contention.

Mr. Miller filed two briefs in the case, and in neither did he make any such a contention as that the upper end of arm "24" of the Hauser device was slidably attached to the sash in any manner. The

Court will find Mr. Miller's views on this subject in his Opening Brief, on page 17. On page 19 thereof, near the middle, he says:

"Now in the Hauser structure the lower end of the adjuster arm does not slide in the groove of the window frame, but is fixedly pivoted there, and in order to compensate for this the sliding mechanism has been transferred to a groove in the window sash, in which the end of the carrier arm slides."

This is, undoubtedly, correct so far as the slidability of the Hauser carrier arm "19" and the non-slidability of the upper end of the Hauser adjuster arm "24" is concerned. The same statement appears on page 20 of said brief, near the top thereof.

If it were true that the upper end of the Hauser adjuster arm "24" was slidably pivoted to the sash, then there would appear to be a mere change of the location of the slidable function of the arm "7" of the Soule device from one end to the other, and we are not prepared to say that the doctrine of equivalents would not apply to such a mere change of location of the important function of the arm "7" from one end to the other. In other words, if you fixedly pivot the lower end of arm "7" of the Soule patent with the frame and slidably pivot the upper end of the Soule arm "7" to the sash you would have a device operating in the same way; that is, it would make no difference whether the arm "7" of the Soule device was slidably pivoted to the sash or to the frame, but that

is not the question here, and it makes a vast difference in the mode of operation of the two devices.

Again, on the last page of the opinion the Court seems to come to the conclusion that, because there were two arms in each case and each case possessed the function of slidability of an arm at some point, they were the equivalents of each other. The Court seems to have ignored the important feature of the frictional connection of the sash with the frame. Without frictional connection of some kind both of the devices would be wholly inoperative and useless. Soule's frictional connection of the sash with the frame is at the top end of the sash, as hereinbefore explained, while Hauser's sash has no frictional connection with the frame at all. Hauser's sash carries its own frictional device irrespective of the frame, which is at the upper end of the arm "19." It is true this link arm "19" is also at the same time slidable in the groove where the frictional devices are located.

We urge that this should not be considered as a mere change of location; the location of the frictional devices have been changed and that of itself materially affects the operation of the devices. The location of frictional devices at the upper end of the sash is not claimed to be new by Soule. The location of the frictional devices in the Hauser patent, in the manner above described, is an element of each of his claims, and without this frictional element in the Hauser patent it would be wholly inoperative. We urge that this of itself marks important divergence

between these two devices; they are not the same structures and the claims of the plaintiff's patent can not be read upon the Hauser device.

CLAIMS.

It is conceded on all sides that the claims of the patent sued on are combination claims for a device in an old art, and that all of the elements are old in fact as well as in law, and the same of course may be said of the Hauser patent.

We urge that the Court has not applied to the construction of the Soule claims the limitations which the patent laws require in such cases. It is a familiar rule that a claim must precisely define the exact limitation of the invention claimed, also "that the specification, claims and drawings of the patent are a unit; whatever parts of the device are named in a claim are of necessity intended to be named with reference to the specifications and drawings, etc.":

Houser vs. Starr (203 Fed., page 264).

If we understand what is meant by the authorities upon the limitation of claims in inventions covered by combinations, it is that: where an inventor in his specifications and in his claims particularly describes and points out how, where or when a given element should be located to perform a given function, then his claim is so limited, and he is not entitled to go beyond that limitation. Each of these claims is limited so far as the respective arms are concerned;

that is, the adjuster arms must have one end fixedly pivoted at points slightly above the middle of the sash, and the other end slidably pivoted in the frame; carrier arms, one end must be fixedly pivoted in the frame and the other end fixedly pivoted to the corresponding adjuster arm. Unless one end of the adjuster arm is slidably pivoted to the frame, it is not the specific device so carefully described in the specification, and unless the carrier arm is fixedly pivoted at both ends, one end to the frame and the other to the adjuster arm, it is not the invention described in the specification and claims. Further, that the doctrine of equivalents applies only to the individual elements of the combination claimed and not to the whole machine made up of these individual elements. That is to say (as was said by the Supreme Court in *Westinghouse vs. Boden Power Brake Company*, 170 U. S., 42; Law Ed., p. 1136):

“The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term ‘equivalent.’”

Again:

“A mechanical equivalent must be adaptable to use as a substitute for something else, and competent to perform the functions of a particular device for which it may be substituted.”

Alaska Packers' Association vs. Letson (119 Fed. Rep., page 599).

The case of *Arnold-Creager Company vs. Barkwill Brick Company*, reported in the 246 Fed. Advance Sheet of February 7th, 1918, No. 4, page 441, very aptly illustrates our contention in this matter. On page 444 the Court said:

"Assuming that the defendant's device did infringe the claim, in the absence of express limitation therein, yet if the inventor has so limited it he is bound by that limitation, notwithstanding it was voluntarily made. . . . Notwithstanding the specific mention of the *pug shaft* in the first and third claims, we are of the opinion that the inventor has intentionally limited claim 2, at least to the connection of the crank to the pug shaft upon the *front end of the mill*. . . . In a broad sense, and for many purposes, the sides of the charging chamber is the perfect equivalent of the end of that chamber. It may be that Arnold would have been entitled to a claim like claim 2, with 'discharge face' substituted for 'front end'; and if the use of the phrase 'front end' indicated only Arnold's intent to name the location that happened to be the appropriate one in the machine before him for his platen and plunger mechanism, it might well be that the defendant's side location would be its equivalent. However, as we have pointed out, the front end location was not a matter of mere form. The degree of direct communication and of simplicity which Arnold thought to characterize his invention demanded that the location should be on that face through which the pug shaft projected; and when it thus appears that the word of limitation represented a *thought essential* to that which the inventor regarded as his new step, its limiting effect cannot be neutralized through the rule of equivalency."

This case was for the infringement of a brick machine, employing the horizontal pug mill and shaft, etc., and after mentioning several elements the claim specifically mentions a press platen consisting of a *crank mounted on the front end of the pug mill*, and a controversy arose over the construction to be given to this element; that is, whether the plaintiff was limited to a platen consisting of a crank mounted on the front end of the pug mill, and the Court held that he was.

Commencing near the bottom of page 443 and down to the middle of page 444, will be found a description of the two machines, where it will also be found that the only point of controversy was whether the defendant infringed by locating the platen on one side of the pug mill.

In *McClain vs. Ortmyer* (141 U. S., page 425), the Supreme Court said:

“The claim is the measure of the patentee’s right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it.”

Again, in the same case the Court said:

“It is true that, in a case of doubt, where the claim is fairly susceptible of two constructions, that one will be adopted which will preserve to the patentee his actual invention; but if the language of the specification and claim shows clearly what he desired to secure as a monopoly, nothing can be held to be an infringement which does not

fall within the terms the patentee has himself chosen to express his invention."

Citing:

Vance vs. Campbell (66 U. S., 1 Black, 427):

"that, where a patentee declares upon a combination of elements which he asserts constitute the novelty of his invention, he cannot in his proofs abandon a part of such combination and maintain his claim to the rest."

In the case of *Cimiotti Unhairing Co. vs. American Fur Ref. Co.* (198 U. S., p. 399; 49 Law Ed., p. 1100), on page 1105 of the said law edition the Court said:

"In making his claim the inventor is at liberty to choose his own form of expression, and while the courts may construe the same in view of the specifications and the state of the art, they may not add to or detract from the claim. And it is equally true that, as the inventor is required to enumerate the elements of his claim, no one is an infringer of a combination claim unless he uses all the elements thereof."

Citing numerous cases.

We contend that these cases are especially applicable to the case at bar.

Soule limits the construction of his arm "7" by making it slidably pivoted at the bottom end and fixedly pivoted at the upper end. That was his idea, as clearly shown by his specification. Now we say that

an arm fixedly pivoted at both ends is not the equivalent of an arm fixedly pivoted at one end and slidably pivoted at the other end; they do not and cannot perform the same function; and, applying the law of equivalents to the respective elements of the plaintiff's claims the same conclusion is necessarily reached. Element "4" of the plaintiff's device is fixedly pivoted at both ends—one end to the sash and the other to the arm "7," while in the defendant's device the arm or link "19" is not pivoted to the frame at all, but is *frictionally* and slidably pivoted at one end to the sash and fixedly pivoted at the other end to the arm "24."

Now, it seems to us going entirely too far to say that these two arms (that is arm "4" of the Soule and arm "19" of Hauser) perform the same function, or that they are in any sense the equivalent of each other. It seems to us that a glance at the specification of these two patents must show that they do not perform the same functions, nor do they perform any function in substantially the same way. Arm "4" of Soule was introduced for the purpose of maintaining the general equilibrium of the whole device, etc., as will be seen at folio 100. In order to do that, it was necessary that the lower end should be fixedly pivoted somewhere near the middle of the arm "7," as will be seen at folios 60, 65 and 70 of the Soule patent; while on the other hand the function of arm "19" of the Hauser construction is "to create sufficient friction there-against, to prevent the window sash moving from any

position to which it has been turned." This is not the function of arm "4" of Soule's, as we have already mentioned the friction in the Soule patent, which prevents the window sash moving from any position to which it has been turned is at the top of the window sash and frame, as before stated. So, that the function of arm "19" of the Hauser device is the same as the frictional connections between the sash and the frame of the Soule device, and not the function or functions of arm "4"; none of Soule's arms have any frictional connection of any kind, and this very fact of having arm "19" in Hauser performing the function of restraining or controlling the action of the sash, it seems to us clearly and distinctly marks the distinction and principle of operation of the two devices.

To state it in another form: the arm "19" of Hauser with its frictional connection to the sash creates sufficient friction to prevent the window sash *from moving from any position to which it has been turned*. You will note that the sash is already moved or turned before this frictional arm or link "19" performs its function. It has nothing to do with securing the general equilibrium desired, as in arm "4" of Soule, nor allowing the window to be readily shifted from one position to another; you can shift it from one position to another just as well without it as with it, and do it just as readily. These different functions of these two mentioned arms are made necessary on account of the fact that in Soule's device the upper

end of the sash is only slidably connected to the frame and it is evident that it would collapse if it was not for the arm "4." While, in Hauser's device the sash is only frictionally but not slidably pivoted to the frame, and it is evident that for this reason it became necessary to have the frictional and slidable arm "19," which does not and cannot perform the functions of arm "4" of Soule, and without which Hauser's device would collapse.

Reverting again to the fact that it is ~~desired~~ ^{conceded} that these inventions are not pioneers, but both improvements in an old art, we think the Court has not applied the rules applicable to such cases.

The case of *McCormick vs. Talcott* (20 How., 402) states the rule in such cases which has been followed ever since and probably cited oftener than any other case in the books. For convenience, we will quote from it:

"In order to ascertain whether the divider used by defendants infringes that of the complainant, we must first inquire whether McCormick was the first to invent the machine called a divider, performing the functions required, or has merely improved a known machine by some peculiar combination of mechanical devices which perform the same functions in a better manner.

"If he be the original inventor of the device or machine called the 'divider,' he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing ma-

chine may be an improvement of the original, and patentable as such. *But, if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions.* The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

In the case of *Railway Co. vs. Sayles* (97 U. S., 554) this rule has been commented upon and stated in various forms in many later decisions. As we understand this rule it simply means: that where two inventors are mere improvers in an old art one cannot claim the other to be an infringer on the ground of equivalents, unless his devices are mere colorable invasions of the first, and we cannot see how this can be said of the Hauser devices. 'To say, that they are mere colorable invasions of the Soule device would seem to us to be clearly erroneous.

Again, in the said case of *Railway Co. vs. Sayles*, the rule is stated in a modified form as follows:

"If one inventor, in a particular art, precedes all the rest, and strikes out something which underlies all that they produce, he subjects them to tribute. But if the advance towards the thing desired is gradual, so that no one can claim the complete whole, then each inventor is entitled to the specific form of device which he produced,

and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors and does not include theirs."

Another well established rule of construction in such cases is stated as follows:

"Where a combination patent accomplishes no new result in mechanics and differs from previous known combinations only in its construction in one or more of its parts, whereby, *perhaps, a better but not a different kind of result is accomplished, than had been effected, it must be limited to those details of construction*":

Phoenix Caster Company vs. Spiegel (26 Fed. Rep., page 274).

As we read these decisions, it seems that the Court must have held:

(1) That the non-slidable adjuster arm of Hauser was the equivalent of the slidable and fixedly pivoted adjuster arm of Soule, and that the frictionally, slidably adjuster arm "19" of Hauser was the equivalent of the non-frictional, non-slidable carrier arm of Soule, and the sliding mechanism in each, absolutely regardless of the construction, mode of attachment, operation and connection of these devices; or

(2) That because each of them had an adjuster arm of any kind, and a carrier arm of any kind, that therefore—taking the Hauser device as a whole—it

was the equivalent of the Soule device as a whole, because they accomplished the same result.

As was said in *Westinghouse vs. Boyden Power Brake Co.* (170 U. S., 557):

“The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose, is a flagrant abuse of the term ‘equivalent’.”

In the case of *Dresner vs. Diamond* (239 Fed. Rep., page 882), it was said:

“Infringement of a patent for a combination of old elements must be predicated on an appropriation of the same elements or their equivalents in the same combination.”

The words “the same combination” here mean in the same arrangement and in substantially the same structural relations of the elements of the combinations to each other.

It may be that we have made this brief unnecessarily long and gone too far into details, but our excuse for so doing is due to the fact that we feel the Court has unintentionally overlooked many of the controlling features involved, and that injustice has been done to the defendants. While it may seem that these inventions are small matters, yet they are quite

important, as the defendants have built up quite a trade under their own patents and rely upon the same for the support of the patentee, Hauser, and his family.

All of which is respectfully submitted.

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JS

